



This book was digitized by Microsoft Corporation in cooperation with Cornell University Libraries, 2007.

You may use and print this copy in limited quantity for your personal purposes, but may not distribute or provide access to it (or modified or partial versions of it) for revenue-generating or other commercial purposes.

Cornell University Library
KD 1162.W91 1864

A treatise of the law of sewers :includi



3 1924 021 740 851

law

A
TREATISE
OF THE
LAW OF SEWERS,
INCLUDING
The Drainage Acts.

BY
HUMPHRY W. WOOLRYCH,
SERJEANT AT LAW.

THIRD EDITION,
WITH CONSIDERABLE ADDITIONS AND ALTERATIONS.

LONDON:
BUTTERWORTHS, 7, FLEET STREET,
Law Publishers to the Queen's most excellent Majesty.
1864.

L O N D O N :
PRINTED BY C. ROWORTH AND SONS,
BELL YARD, TEMPLE BAR.

P R E F A C E

TO THE THIRD EDITION.



THE considerable changes in the Statute Law of Sewers, and the numerous decisions since the Second Edition of this Work, have rendered another amended and enlarged Copy of it an object of fair speculation. The Acts upon the important questions of Sewers and Drainage are far more complicated than the Cases. The reader will, however, be assisted by copious Tables of Statutes and Cases, and his attention is directed to the Addenda, which he will, of course, incorporate with the Work: some of these Addenda are new, some belong to errors, “*Quos humana parum cavit natura:*” they are few, but should not be lost sight of.

The Author submits the present Edition with some confidence to the Profession, since they have already recognized the usefulness of those Editions which have preceded it.

2, HARE COURT, TEMPLE,
July 20, 1864.

CONTENTS.

CHAPTER I.

Of Commissions of Sewers, and their Origin.

	PAGE
Derivation of "Sewer"	1
Origin of commissions	2
Commissions by statute	4
The Statute of Sewers, 23 Hen. 8	8
Duchy of Lancaster	10
Saving of fines	11
Charges of commissioners	<i>ib.</i>
Local Management Act	<i>ib.</i>
Vestry or District Board	12
The Act for Promoting the Public Health	13
Commissions under the Drainage Act	27
Qualification of commissioners of sewers	30
Oath	39
Form of it	<i>ib.</i>
Forfeiture for not being qualified	41
Allowance to commissioners	42
Continuance of commissions	43
Demise of the Crown	46
No certificate nor return of commission	47
Saving clauses	49

CHAPTER II.

Of the Duties and Powers of Commissioners of Sewers.

The Commission	55
Inquiry into annoyances	<i>ib.</i>
Assessment	<i>ib.</i>
Repair	56
Putting down annoyances	<i>ib.</i>
Appointment of officers	<i>ib.</i>
Distress for arrears	<i>ib.</i>
Taking labourers, &c.	<i>ib.</i>
Making of laws	57
Awarding of writs, &c.	<i>ib.</i>
Survey	<i>ib.</i>
Compelling obedience to orders	<i>ib.</i>

	PAGE
Declaration of powers of commissioners under 24 & 25 Vict. c. 133	59
Restrictions as to obstructions	60
Romney Marsh	62
Survey	64
Walls	65
Streams and watercourses	67
Rivers	<i>ib.</i>
Ditches	70
Banks	71
Gutters	72
Sewers	<i>ib.</i>
Gates	77
Calcies	<i>ib.</i>
Bridges	78
Trenches	79
Annoyances	<i>ib.</i>
Outrageous springs	<i>ib.</i>
Mills and mill-streams	80
Wears, &c.	<i>ib.</i>
Gates, &c.	<i>ib.</i>
Hebbing-wears, &c.	<i>ib.</i>
Ponds	<i>ib.</i>
Pools	81
Inquiry into the ownership of lands, and into defaults	<i>ib.</i>
Repair, who liable to	82
Person repairing must be benefited	83, 85
Frontage	87
Use	<i>ib.</i>
Tenure	88
Prescription and custom	89
Covenant	90
Grant	92
Laws of sewers	93
Corporations, when liable	94
Townships	<i>ib.</i>
Repairs, when made by the level	98, 105
New walls, &c.	104, 117
Ecclesiastical persons	107
Lords of manors	<i>ib.</i>
Copyholders	<i>ib.</i>
Ferry	108
Reversioners	<i>ib.</i>
Mortgagors	109
Officers, &c.	110
Annuitants	<i>ib.</i>
Tithes	111
Goods	112
Perpetual charge	113
Exchange of repairs	117
Destruction of annoyances	126
Private nuisances	131
Public Health Act	132

CHAPTER III.

*Of the Proceedings of Commissioners of Sewers in further-
ance of the powers intrusted to them* . . . 144

	PAGE
They are a Court of Record	145
Three form a Court	145, 147
May partition districts into sub-districts	146
Meetings	147
Special meetings	148
Appointment of their officers	<i>ib.</i>
Officers punishable	149
Removal of officers	150
Bond by them	152
Constables	155
Officers under the boards of health	<i>ib.</i>
Commissioners to make laws and decrees	160
To summon a jury	161
From whence summoned	163
Juries may be dispensed with	168
Surveyor's presentment	<i>ib.</i>
What presentments traversable	169
Assessment, how made	170
Amendment of rate	175
Rates under 21 & 22 Vict. c. 98	<i>ib.</i>
Returns	181
Appeal	182
Power to borrow money	185
Mortgage clauses under 21 & 22 Vict. c. 98	187
Purchase of lands	189
Punishments by commissioners	202
Fines	<i>ib.</i>
Must be reasonable	203
Fines, whether traversable	<i>ib.</i>
Amerciaments	204
Imprisonment	205
Distress	209
Warrant	211
Distress, where	212
Whose goods	213
Sale	<i>ib.</i>
Replevin	214
Decree of lands	217
What lands to be sold	220
Who bound by these decrees	221
To whom lands may be decreed	222
Mandamus	<i>ib.</i>
Indictment	223
Actions	<i>ib.</i>
Proceedings under 11 & 12 Vict. c. 63	226

CHAPTER IV.

Of the various Proceedings which may be had against Commissioners of Sewers.

	PAGE
Certiorari	229
Disobedience to the writ	237
Procedendo	239
Mandamus	241
Actions	242
Notice of action	248
Tender of amends	250
Injunction	ib.
Arbitration	251, 252
Trial	252

CHAPTER V.

Of the Drainage Acts.

The Drainage Acts, 3 & 4 Vict. c. 55	254
8 & 9 Vict. c. 56	255
9 & 10 Vict. c. 101	259
Advances of money under 9 & 10 Vict. c. 101	260, 270
The provisional certificate	263
Which may be assigned	264
Other matters under 9 & 10 Vict. c. 101	267
Apportionment and redemption of rent-charge	275, 276
Of the 10 & 11 Vict. c. 38	278
Electoral Drainage Boards, 24 & 25 Vict. c. 133	288
The Towns' Improvement Clauses Act, 10 & 11 Vict. c. 34	291

APPENDIX—Forms and Precedents	295
---	-----

INDEX	307
-----------------	-----

TABLE OF STATUTES.

	PAGE		PAGE
Hen. 3, 9, c. 15 ..	5	Geo. 3, 35, c. 77 ..	70
c. 16 ..	5	41, c. 109, s. 10 ..	288
c. 23 ..	5	52, c. xlviii. s. 7 ..	107
Edw. 1, 13, c. 36 ..	210	57, c. xxix. ..	248
3, 27, c. 1 ..	48, 192	Geo. 4, 5, c. 100 ..	11, 13
Hen. 6, 3, c. 5 ..	6	6, c. 38 ..	13, n.
9, c. 9 ..	6	7, c. 64, s. 18 ..	223
Hen. 8, 23, c. 5, s. 1 ..	8	Will. 4, 3 & 4, c. 22, s. 1 ..	31
s. 2 ..	9	s. 2 ..	40
s. 3 ..	9, 55	s. 3 ..	40
s. 4 ..	11, 161	s. 4 ..	41
s. 5 ..	39	s. 5 ..	41
s. 7 ..	58	s. 7 ..	46
s. 8 ..	217	s. 8 ..	147
s. 9 ..	59, 218	s. 9 ..	148
s. 10..	31	s. 10 ..	75
s. 11..	216	s. 11 ..	162
s. 13..	43	s. 12 ..	166
s. 14..	10	s. 13 ..	167
s. 15..	11	s. 14 ..	171
s. 16..	47	s. 15 ..	171
s. 17..	43	s. 16 ..	97,
s. 20..	10	151, 186	
25, c. 10, s. 2 ..	40	s. 17 ..	167
c. 25, s. 1 ..	40	s. 18 ..	171
Mar. 1, sess. 3, c. 11, s. 1 ..	122	s. 19 ..	122
s. 2 ..	58, 122	s. 20 ..	123
Eliz. 13, c. 9, s. 1 ..	47, 217	s. 21 ..	122,
s. 2 ..	43	123	
s. 3 ..	44	s. 22 ..	83
s. 4 ..	32	s. 23 ..	83, 84
s. 6 ..	11, 149	s. 24 ..	190
s. 7 ..	33	s. 25 ..	190
43, c. 4 ..	112	s. 26 ..	190
Jac. 1, 3, c. 14, s. 1 ..	69	s. 27 ..	192
s. 2 ..	69	s. 28 ..	192
Car. 2, 13 & 14, c. 2 ..	75	s. 29 ..	192
15, c. 17, s. 15 ..	222	s. 30 ..	194
W. & M. sess. 2, c. 8, s. 14,	75, 115	s. 31 ..	195
Ann. 7, c. 10, s. 1 ..	221	s. 32 ..	196
s. 2 ..	221	s. 33 ..	196
s. 3 ..	209	s. 34 ..	196
		s. 35 ..	196

Table of Statutes.

	PAGE		PAGE
Will. 4, 3 & 4, c. 22, s. 36..	195, 197	Vict. 4 & 5, c. 45, s. 11	.. 146
s. 37	.. 197	s. 12	.. 148
s. 38	.. 195,	s. 13	.. 51
	198	s. 14	.. 51
s. 40	.. 198	s. 15	.. 50
s. 41	.. 184	s. 16	.. 51
s. 42	.. 185,	s. 17	.. 51
	187	s. 18	.. 51
s. 43	.. 186,	c. 89	.. 261
	187	5, c. 9, sess. 2	.. 188
s. 44	.. 146	5 & 6, c. 89	.. 261
s. 45	.. 146	6 & 7, c. 71, s. 12	.. 258
s. 46	.. 167,	s. 13	.. 258
	169	c. 85	.. 247
s. 47	.. 146,	7 & 8, c. 84, s. 13 (Metro-	
	156	polis Buildings)	.. 135
s. 48	.. 152	s. 18	.. 135
s. 49	.. 154	s. 61	.. 135
s. 50	.. 154	8, c. 18, s. 6	.. 200
s. 51	.. 149	8 & 9, c. 56 (Drainage	
s. 52	.. 155	Act) 255, 257	
s. 53	.. 208	c. 69	.. 261
s. 54	.. 208	c. 118	259, 284, 288
s. 55	.. 201	9 & 10, c. 62 (Deodands)	34
s. 56	.. 201	c. 95, s. 58	.. 181
s. 57	.. 224,	c. 101 (Drainage	
	247	Act)	.. 258
s. 58	.. 224	10, c. 11, ss. 1, 2	.. 260
s. 59	.. 224	c. 38, s. 4	.. 24, 279
s. 60	.. 145	ss. 5, 7	.. 281
s. 61	50, 63	s. 8	.. 282
s. 62	.. 50	s. 9—12	.. 283
5 & 6, c. 33	.. 239	s. 13	.. 284
c. 50	.. 288	s. 14	.. 285
s. 105	.. 183	s. 15—17	.. 286
c. 76	.. 23	ss. 18, 19	.. 287
6 & 7, c. 71, s. 12	.. 258	cc. 79, 106	.. 261
s. 13	.. 267	c. 113	.. 261
s. 69	.. 111	10 & 11, c. 11 (Drainage	
s. 81	.. 274	Act)	.. 258
c. 115	.. 288	c. 34	.. 291
Vict. 2 & 3, c. 47, s. 60	.. 50	c. 38 (Drainage	
3 & 4, c. 55 (Drainage Act)	254	Act)	.. 279
c. 87, ss. 18, 19, 74	50	s. 18	.. 51
c. 97	.. 248	c. 47	.. 293
4 & 5, c. 12, ss. 17, 18, 74	50	11 & 12, c. 43, s. 21	.. 223
c. 45, s. 1	96, 151	63, s. 1	.. 18
s. 2	97, 151	s. 2	18, 22,
s. 3	98, 151		249
s. 4	.. 186	s. 12	.. 23
s. 5	.. 186	s. 13	.. 23
s. 6	.. 186	s. 14	.. 18
s. 7	.. 168	s. 15	.. 25
s. 8	.. 175	s. 16	.. 24
s. 9	.. 225	s. 17	.. 24
s. 10	.. 147	s. 18	.. 24
		s. 19	.. 24

	PAGE		PAGE
Vict. 11 & 12, c. 63, s. 20	.. 24	Vict. 11 & 12, c. 63, s. 104	.. 181
s. 21	.. 24	s. 106	.. 181
s. 22	.. 24	s. 108	.. 188
s. 31	.. 25	s. 109	.. 188
s. 32	.. 23	s. 110	.. 188
s. 33	.. 23	s. 111	.. 188
s. 34	156, 293	s. 112	.. 189
s. 35	.. 157	s. 113	.. 189
s. 36	.. 157	s. 114	.. 189, 293
s. 37	157, 291	s. 115	.. 156
s. 38	.. 158	s. 116	.. 156, 293
s. 39	.. 158	s. 118	.. 90
s. 40	.. 292	s. 119	.. 189
s. 41	140, 292	s. 120	.. 26
s. 42	64, 141, 292	s. 121	.. 26
s. 43	26, 52, 292	s. 123 <i>passim</i>	
s. 44	26, 132	s. 123—128	252
s. 46	.. 133	s. 124	.. 199
s. 47	.. 133	s. 127	.. 157
s. 48	.. 134	s. 129 <i>passim</i>	
s. 49	134, 292	s. 130	.. 226
s. 50	.. 135	s. 131	.. 214
s. 51	.. 136	s. 132	.. 227
s. 52	.. 136	s. 133	.. 227
s. 53	.. 137	s. 134	.. 227
s. 54	.. 137	s. 135	81, 227
s. 56	.. 138	s. 136	.. 182
s. 58	.. 138	s. 137	.. 182, 227
s. 59	136, 139	s. 138	.. 227, 249
s. 60	140, 145	s. 139	.. 248
s. 65	.. 140	s. 140	.. 249
s. 74	.. 141	s. 141	.. 249
s. 75	135, 141	s. 143	26, 293
s. 76	.. 141	s. 144	.. 26
s. 77	.. 142	s. 145	50, 52, 59, 76
s. 78	.. 142	s. 146	.. 138
s. 79	.. 142	s. 147	.. 228
s. 80	.. 142	s. 148	.. 158
s. 84	.. 143	s. 150	.. 249
s. 85	124, 143	s. 151	.. 27
s. 86	.. 176	c. 112, c. 1 (Me-	
s. 87	.. 176	tropolis Sewers Act)	11
s. 89	.. 179	c. 23	.. 261
s. 90	.. 176	c. 111	.. 140
s. 91	.. 177	c. 119	.. 265
s. 92	.. 177	ss. 1, 2	.. 140
s. 93	.. 177	ss. 3, 4	.. 140
s. 94	.. 177	c. 123	.. 140
s. 96	.. 180	12 & 13, c. 31	.. 261, 265
s. 97	.. 180	c. 50, s. 10	.. 146, 247
s. 98	.. 180	c. 93, s. 2	.. 12
s. 99	.. 180	s. 4	.. 250
s. 100	.. 180		
s. 101	.. 180		
s. 102	.. 180		
s. 103	<i>passim</i>		

	PAGE		PAGE
Vict. 12 & 13, c. 93, s. 17 ..	184	Vict. 21 & 22, c. 98, s. 58 ..	183
s. 43 ..	180	s. 59 ..	183
c. 160 ..	28	s. 62 ..	177
14 & 15, c. 60, s. 4 ..	50	s. 63 ..	177
15 & 16, c. 85, s. 43 ..	12	s. 68 ..	50
s. 86 ..	12	ss. 69, 70 ..	252
16 & 17, c. 34, s. 37 ..	66	s. 75 ..	176
c. 128, s. 7 ..	52	s. 78 ..	182
c. 130 ..	261	ss. 79, 80,	
17 & 18, c. 125 ..	182	81 ..	182
18 & 19, c. 110 ..	261	c. 104, s. 1—8 ..	13
c. 120, s. 68—76 ..	12	s. 9—23 ..	14
s. 76 ..	133	s. 24—33 ..	15
s. 77 ..	16	23 & 24, c. 51 ..	181
s. 80 ..	12	24, c. 13, s. 5 ..	53
ss. 88, 89 ..	13, 16	24 & 25, c. 41, s. 7 ..	53
ss. 204, 205 ..	17	c. 133 ..	261
s. 135—138 ..	13	s. 2 ..	27
s. 135 ..	15	ss. 4, 5 ..	27
s. 136 ..	15	ss. 6, 7 ..	28
s. 145 ..	11, 13	s. 8—13 ..	29
s. 146—148 ..	13	s. 14 ..	46
s. 161 ..	178,	s. 15 ..	147
184		s. 16 ..	59
s. 163 ..	184	s. 17—20 ..	60
ss. 163, 164 ..	14	s. 18 ..	289
s. 164 ..	178	s. 21 ..	193
s. 168 ..	13	s. 22 ..	193
s. 169 ..	14,	s. 23—27 ..	194
178		s. 29—32 ..	124
s. 171 ..	14	s. 33 ..	168
ss. 175, 176 ..	178	s. 34—37 ..	90
s. 180—182 ..	13	s. 38 ..	174
s. 187 ..	13	s. 39 ..	175
s. 210 ..	18	ss. 40, 41 ..	187
s. 213 ..	17	s. 42 ..	224
ss. 242, 243, ..	250 ..	s. 43—46 ..	224
250 ..	17	ss. 47, 48, ..	49 ..
c. 121, s. 14 ..	242	49 ..	182
s. 22 ..	139,	s. 52 ..	229
182		s. 53 ..	250
s. 43 ..	50	s. 54—57 ..	53
c. 19 ..	288	s. 58 ..	143
19 & 20, c. 62 ..	261	s. 59 ..	117
c. 120, s. 14 ..	293	s. 60 ..	27, 53
20 & 21, c. 43, s. 2 ..	182	s. 63—72 ..	288
21 & 22, c. 98, s. 8 ..	187	s. 73—76 ..	289
s. 54 ..	176, 180	s. 77—83 ..	290
s. 55 ..	176, 178	25 & 26, c. 93, s. 8, ..	52
s. 56 ..	178	s. 67 ..	52
s. 57 ..	182	c. 101 ..	29
		c. 102, s. 1—18 ..	15
		ss. 27, 28 ..	16
		s. 30 ..	16

Table of Statutes.

xiii

	PAGE		PAGE
Vict. 25 & 26, c. 102, s. 32	16, 29	Vict. 25 & 26, c. 102, ss. 204, 205	17
s. 44—47	16	s. 213 ..	17
s. 46 ..	29	ss. 242, 243	17
s. 50—61	16	s. 250 ..	17
ss. 62, 65,		26 & 27, c. 26 ..	261
66 ..	17	c. 45, s. 28 ..	50
ss. 68, 69	17	c. 68, s. 2 ..	13
s. 80 ..	29	s. 6 ..	15
s. 83	17, 86	c. 88 ..	261
s. 86 ..	17		
ss. 112, 116,			
117 ..	17		

TABLE OF CASES.

A.			PAGE
Allen v. Carter	237		
— v. Hayward	246		
Alston v. Grant	250		
Anon. (Repair by Corporation) ..	72		
— (Certiorari)	235, 237		
Anselm v. Barnard	85		
Apsley, R. v.	237		
Archd. de Rochester's case ..	149		
Armitstead v. Durham	251		
Arthur v. Commissioners of Sewers	150, 234		
Att.-Gen. v. Birmingham Bo- rough Council	133		
— v. Donaldson	107		
— v. Walker	291		
Austin v. Lambeth Vestry ..	133		
— v. St. Mary, Lambeth ..	135		
Austye v. Fawkenner	89		
B.			
Baker, R. v.	239		
Ball v. Partridge	230		
Banks, R. v.	150		
Barraud v. Archer	256		
Bassett, Ex parte	242		
Bell v. Partridge	230		
— v. Twentymen	84		
Bennett v. Womack	91		
Birkett v. Crozier	165		
Birley v. Chorlton-upon Med- lock	233		
Birmingham Borough Council, Att.-Gen. v.	133		
Bishop, R. v.	240		
Bodkin, R. v.	139		
Bow v. Smith	174		
Bradley v. Southampton Local Board	124		
Breedon v. Murphy	218		
Bristol Dock Company, R. v. ...	72, 130, 131, 241		
C.			PAGE
Bromley (Inhabitants of) case ..	236		
Brown v. Hamond	220		
— v. Sargent	246		
Brownlow v. Metropolitan Board ..	15		
Brungy v. Lee	147, 173		
Bruster, The Protector v. ...	203, 208, 238		
Bullock, R. v.	252		
Butler, R. v.	231		
Cann, R. v.	239		
Champ, Ex parte	242		
Chester Mill case	126		
Christie, app., Guardians of St. Luke, resps.	178		
—, Ex parte	258		
Clarke v. Paddington Vestry ..	133		
Clayard v. Dethick	245		
Clements v. Pollard	227		
Clothier v. Webster	247		
Combs v. Cheney	214		
Commins v. Massam	91, 92		
Commissioners of Sewers v. Newburg	96, 174		
— v. Wilmore	169, 232		
— Yorkshire case	233		
Conisby's case	95		
Cooper v. Wandsworth Board ..	12		
Cornwall v. Metropolitan Sewers Commissioners	71		
Cortis v. Kent Waterworks Company	175		
Cotton, R. v.	139		
Coulton v. Ambler	52, 71		
Crossman v. Bristol, &c. Rail- way Company	251		
Custodes, &c. v. Outwell ..	96, 161, 166		
— Oxford v. Everett	251		
D.			
Daw v. Metropolitan Board ..	53		

Table of Cases.

xv

	PAGE
Dawson v. Paver ..	246
Day and Rex v. Commissioners of Sewers ..	234
Devonshire (Earl of) v. Gibbons ..	94
Dimock's case ..	120
Donaldson, Att.-Gen. v. ..	248
Dore v. Gray ..	74
Dorling v. Epsom Local Board ..	86
Drew v. New River Company ..	245
Dunbar's case ..	234

E.

Eau Brink Drainage, In re ..	194
Ely (Isle of) case ..	95, 118, 125
Emmerson v. Saltmarsh ..	96
Empson v. Metropolitan Board ..	178
Essex Commissioners, R. v. ..	104

F.

Farr v. Crisp ..	211
Felkin v. Lord Herbert ..	251
Fens Commissioners, R. v. ..	232
Fenton v. Doyle ..	216
Fitzwilliam's case ..	108
Friend v. Bennett ..	184

G.

Gamble, R. v. ..	222
Gardner, R. v. ..	173
Glossop, R. v. ..	13
Godfrey's case ..	169
Goodchild, R. v. ..	178
Gosse, R. v. ..	139
Gray v. Pullen ..	247
Grew v. Hill ..	245
Griffith's case ..	101
Grocers' Company v. Donne ..	252

H.

Hall v. Mason ..	128
Hargreaves v. Taylor ..	138
Harling v. Cooper ..	245
Harrison v. Stickney ..	76, 175
Hayward v. Lowndes ..	132
Head, R. v. ..	86, 184
Heart and Rex v. Commissioners of Sewers ..	236
Henley v. Mayor, &c. of Lyme ..	93, 102
Hetley v. Boyer ..	207, 238

	PAGE
Hide, R. v. ..	67, 128, 223
Hornsey Local Board, Ex parte ..	139
Hull (Level of) case ..	173
Hungate's case ..	237
Hunger's case ..	237
Hurrell v. Winks ..	173

I.

Inclosure Commissioners, Re. ..	281, 290
Ingham, R. v. ..	13
Isle of Ely, Case of ..	95, 118, 125

J.

Jones v. Bird ..	244
------------------	-----

K.

Keighley's case ..	99, 100
Kelk, R. v. ..	51
Kent, Justices of, R. v. ..	91
Kerrison v. Sparrow ..	251

L.

Lands Improvement Company v. Richmond ..	276
Lashbrooke's case ..	211
Lee v. Vessey ..	211
Leigh, R. v. ..	104, 253
Licensed Victuallers, R. v. ..	174
Lincolnshire Commissioners, R. v. ..	234
Liverpool (Mayor of), Ex parte ..	139
Lloyd v. Wigney ..	248
Lluellin, R. v. ..	49

M.

Marris, R. v. ..	201
Masters v. Scroggs ..	86
Mathias, R. v. ..	162
Mattison v. Hart ..	183
Medley v. Pritchard ..	251
Meek v. Whitechapel Board ..	247
Metropolis Board v. Vauxhall Bridge Company ..	86, 183
Metropolitan Board, R. v. ..	252
——— Lewisham v. ..	252
——— Commissioners, R. v. ..	253
Middlesex Justices, R. v. ..	139

	PAGE		PAGE
Middleton, R. v. ..	182, 184	R. v. Butler	231
Mildmay, R. v. ..	238, 240	— v. Cann	239
—, Ex parte ..	257	— and Day v. Commissioners	
Mills v. Funnell ..	29, 53	of Sewers	104
Moss, app., London Commis-		— v. Cotton	139
sioners of Sewers, resps. ..	29	— v. Essex Commissioners ..	104
		— v. Fens Commissioners ..	232
		— v. Gamble	222
		— v. Gardner	193
		— v. Glamorganshire ..	232
		— v. Glossop	13
		— v. Goodchild	178
		— v. Gosse	139
		— v. Head	86, 184
		— and Heart v. Commissioners	
		of Sewers	236
		— v. Hide	67, 128, 223
		— v. Ingham	13
		— v. Kelk	51
		— v. Kent Justices	91
		— v. Leigh	104, 253
		— v. Licensed Victuallers ..	174
		— v. Lincolnshire Commission-	
		ers	234
		— v. Lluellin	49
		— v. Marris	201
		— v. Mathias	162
		— v. Metropolitan Board ..	252
		— v. Metropolitan Commis-	
		sioners	253
		— v. Middlesex Justices ..	139
		— v. Middleton	182, 184
		— v. Mildmay	238, 240
		— v. Newman	182
		— v. Norfolk Commissioners ..	97
		— v. Onze Bank	241
		— v. Pagham Commissioners ..	66
		— v. Parkinson	253
		— v. Pratt	154
		— and Day v. Sewers Commis-	
		sioners	234
		— v. Smith	49, 238
		— v. St. Luke's, Chelsea ..	242
		— v. Somerset Sewers Commis-	
		sioners	46, 102, 164, 241
		— v. South Holland Drainage	192
		— v. Tatham	139
		— v. Tower Hamlets Commis-	
		sioners 115, 161, 173, 231, 242	
		— v. Vachel	68
		— v. Vange	174
		— v. Warner	139
		— v. Warton	168, 183
		— v. Warwickshire Sheriff ..	193
		— v. Westham	126
		— v. Whittaker	96, 226
		— v. Wright	85
		— v. York, Justices of ..	193

	PAGE		PAGE
Rooke's case	7, 115, 116	Tower Hamlets Commissioners,	
Ruck v. Williams	247	R. v.	115, 161, 173, 231, 242
Russell v. Shenton	84	Tracey v. Taylor	110, 172
		Tucker v. Maitland	173
S.		V.	
Saint Botolph's Overseers, apps.,		Vachel, R. v.	68
Whitechapel Board, resps. ..	86	Vange, R. v.	174
Saint Katherine's Dock Com-			
pany v. Higgs	76, 86, 115, 175	W.	
— Luke's, Chelsea, R. v. ..	242	Walker, Att.-Gen. v.	291
Sapcots v. Grantham	117	Waller v. Andrews	91
Saunders v. Taylor	153	Ward v. Lee	249
Shandrigany Vill v. Sholedam		Warner, R. v.	139
Vill	3	Warren v. Dix	169, 173, 214, 247
Smith's case	49, 238	Warton, R. v.	168, 188
Smith v. Bell	70	Warwickshire, Sheriff, R. v. ..	193
—, R. v.	49, 238	Westham, R. v.	126
Soady v. Wilson	87, 107	Whitley v. Fawsett	105, 210
Somerset Sewers Commission-		Whittaker, R. v.	96, 226
ers, R. v.	46, 102, 164, 241	Wingate v. Waite	162
Southampton Proprietors v.		Woodward v. Cotton	245, 287
Southampton Local Board	247	Wright, R. v.	85
South Midland Drainage, R. v.	192		
Stafford v. Hamston	86, 115	Y.	
Stainton v. Woolrych	252	Year Books—	
Stanhope v. Stanhope	256	Edw. 3, 18, 23	4, 100
Stewart v. Jones	182	Ass. 19, pl. 6	127, 169
Stracey v. Nelson	200	37, pl. 10	88, 94
Sutton v. Mayor, &c., of Nor-		38, pl. 15	3, 88
wich	133	42, pl. 14	127
Swaine v. Rogers	80	Hen. 4, 7, 31	89
Sweet v. Seager	17	11, 34	242
Syson v. Johnson	87	12, 7	4, 88
		6, 20, 1	4
T.		7, 5, 3	169
Tatham, R. v.	139	8, 5	83
Taylor v. Clements	192	Yeaw v. Holland	68
— v. Loft	46, 165, 167	York, Justices of, R. v. ..	193
—, Ex parte	240	Yorkshire Commissioners' Case	233
Tenant v. Goldwin	250		
Thirshy v. Loam	46		

ERRATA.

- Page 12, line 9, *for* "the statute" *read* "the repealed statute."
" 10, *for* "ordains" *read* "ordained."
" 58, note (a), *for* "sess. 9" *read* "sess. 3."
" 124, *for* "Public Health Bill" *read* "Public Health Act."
" 183, *read* "the rate under 3 & 4 Will. 4, c. 22, s. 10, was held bad."
-

ADDENDA.

- Page 26, *after* "general board" *add* "now the privy council."
" 77, as to branching private drains into public sewers, see 18 & 19 Vict. c. 120, s. 78.
" 141, the powers of water supply under 11 & 12 Vict. c. 63, s. 76, are extended to 21 & 22 Vict. c. 98, by the 51st section.
" 178, note (a), *read* "18 & 19 Vict. c. 120, s. 64."
" 178, note (b), *read* "18 & 19 Vict. c. 169. See ss. 175, 176."
" 180, *after* "sickness" *add* "sect. 96."
" 180, *after* "distress" *add* "sect. 99."
By sect. 98, an estimate is to be prepared by the local board before the rate is made.
" 194, provisional orders confirmed, 26 & 27 Vict. c. 63; and by sect. 2, nothing in 24 & 25 Vict. c. 133, shall render works legal which would have been illegal had this act not passed, by reason of injury to property. And damages paid to the party injured shall be deemed to be costs incurred by the board in defending legal proceedings under the Land Drainage Act of 1861.
As to Ireland, 26 & 27 Vict. c. 88.
27 Vict. c. 14. By sect. 2, the Chancellor of the Duchy of Lancaster may appoint an agent for the Crown, and may revoke the appointment and appoint another. A change in the chancellorship shall make no difference. The agent shall be a member of the board, and have the same powers as if elected under the Drainage Act (1861).

THE LAW OF SEWERS.

CHAPTER I.

Of Commissions of Sewers, and of their Origin.

WHATEVER be the derivation of the word *sewer*, whether it be compounded of *seoir*, to sit, and *eau* (*a*), water, or of *sea*, and were (*b*), or whether, again, it mean merely to sue, or issue, whence *suera* (*c*) (a dam placed across a river for the taking of fish), or whether it be the diminutive of a river, according to the opinion of *Callis* (*d*), it seems agreed, that the term was originally applied to the protection of land from inundations. According to one of these surmises, a sewer might be defined ;— a wall, or dam, opposed to the inroads of the ocean ; or, if we adopt the last, a fresh water trench supported by banks on either side, for the purpose of carrying water into the sea. All writers agree too in this, that precautionary measures, against the influx of the tide, were enforced in very early times. Sewers, however, are now no longer understood in the limited senses to which we have alluded. A commission of this nature embraces, not merely the defence of the land from marine invasions, nor the convenience of an outlet for water only, it extends to a great variety of other advantages, both public and private. Thus, the jurisdiction of commissioners is available to put down annoyances of various kinds, such as wears, mills, walls, &c., to cause a free course of water from private gutters ; to interfere, if there be occasion, with bridges and causeways in the low

(a) *Termes de la Ley.*

(b) *Callis*, 80.

(c) 4 *Inst.* 275.

(d) *Callis*, 80.

countries; and, in a word, to exercise a far greater authority than in past times.

A more enlarged detail of these powers will be reserved for another place (*e*), where the statute of Henry 8, to which the commissioners are chiefly indebted for their capabilities, will be fully set forth.

Strictly speaking, a sewer is for public, and a gutter for private accommodation; but it is desirable to observe, that, in the course of our inquiry, we shall find the term sewer frequently applied so as to include gutters.

Origin of
commissions
of sewers.

It has been already intimated, that the rise of these commissions of sewers must be attributed to a very early period; and it certainly cannot be a matter of surprise, that our ancient monarchs were much interested in preserving their dominions from the ravages of the sea, and that their subjects were as careful to second these designs, by keeping up a system of drainage. Accordingly, on the one hand, it is to be found in our legal history, that it was not only the custom of the kings of England, but their duty also, to save and defend the realm against the sea, as well as against enemies, so that it should neither be drowned, nor wasted (*f*); and on the other, that to stop the water channels which were made from time to time, for public or private convenience, was a grievous offence, punishable by action, or indictment, according to the nature of the wrong (*g*). Thus, it is said, that the king's subjects ought, by the common law, to have their passage through the realm by bridges and highways in safety, so that if the sea walls were broken, or the sewers or gutters not secured that the fresh waters might have their direct course, the king was empowered to grant a commission to inquire into, and to hear and determine the defaults (*h*). Again, Fitzherbert says, that these commissions were granted when the sea walls were broken, or when the sewers and gutters were in need of repair, so that the fresh

(*e*) *Post*, Chap. II.

(*f*) 10 Rep. 141. Callis, 25. . 5 Bing. 110.

(*g*) Callis, 80.

(*h*) 10 Rep. 141. See Callis, 23.

waters could not have their courses ; and that the commissions in question issued, because the king was bound of right so to keep his kingdom against the sea, as that it were not drowned or wasted, and also to provide, that his subjects should pass through the kingdom with safety (*i*). Thus, at the complaint of Henry de Lacy, Earl of Lincoln, a commission of sewers was granted to Roger de Brabason, Mayor, and the sheriffs of London (*k*). And in the reign of Edw. 3, a presentment appears to have been made before certain commissioners, of a bridge, which the abbot of N. ought to have repaired, and the court was moved to direct that a jury should inquire into the matter, which was granted (*l*). Nevertheless, it is observable, that of these two sorts of commissions concerning sewage, that which protected the kingdom against the sea must be considered the most ancient, because it was the only commission known to the common law ; for, notwithstanding the actions which were occasionally brought for obstructing private water-courses, and the remedy by indictment, which certainly lay for an injury to public drains, these latter easements do not appear to have been within the commission of sewers at common law ; and this position is illustrated by the words of Lord Ch. J. Holt, who said, that commissions of sewers, to defend the kingdom against the sea, were very ancient, and even in some cases by special prescription ; but that sewers for melioration of land were by act of Parliament (*m*). And Lord Hale, observing that the king has an *interest of jurisdiction* in rivers, says, that the rise of commissions of sewers was, because the sewers were not kept (*n*). But the disturbance of a sewer, or watercourse, was not dispunishable before the statutes, although no commission was in force upon that particular subject. Thus, trespass was brought against the master of Saint Mark, of B., for that he had not repaired a ditch, to the immemorial cleansing of which he and his ancestors were bound by reason of tenure ; in consequence of which omission, the water had been disturbed in its

(*i*) F. N. B. 258.

(*k*) 4 Inst. 275, citing Rot. Parl. 35 Edw. 1, at Carlisle.

(*l*) 38 Ass. pl. 15 ; and see 4 Inst. 276, where other ancient commissions are mentioned.

(*m*) The Vill of Shandrigany *v.* The Vill of Sholedam, 12 Mod. 331. Holt's Cases, 643.

(*n*) De Jure Maris, p. 8.

course, and twenty acres of the plaintiff's land, sown with corn, had been surrounded. The brief was abated, but not on account of any objection to the remedy which had been sought for by the plaintiff (*o*). So again, the plaintiff counted against the defendant for having made waste in certain land which the defendant held as tenant by curtesy, and the waste alleged was by suffering a sewer in the same land to be out of repair, in consequence of which part of it was surrounded by water. There were difficulties in this case as to the ultimate issue of the action; but no objection was made to the principle of it (*p*). This last matter took place shortly after the passing of the first commission, but before the famous act of Hen. 8, and it is quoted for the purpose of showing, that these easements could not be allowed to fall into decay with impunity.

Again, the omission to repair sea walls was actionable before the commissions of sewers were established; as where the defendant was charged for not repairing a wall, and it was endeavoured to be shown on his behalf, that he was not liable, because he had only done repairs twice within the time of memory; but the judgment was, that he should be distrained to do it (*q*).

And, in general, the jurisdiction over banks, ditches, sewers, &c., which did not adjoin the sea, was in the leet of each town, which had view thereof, and power to compel the doing of repairs and the removal of annoyances, according as necessity required. For which end also there was a power to assess, distrain, amerce, &c. in conformity with the custom of the town, and the law of the land (*r*).

Commissions
by statute.

The efficacy of these commissions became at length so obvious, that it was determined to pass a law, by which they might be in some degree continued, and made familiar to the nation. And this consideration brings us to the mention of the statutory provisions regarding sewers.

(*o*) 12 Hen. 4, 7.

(*p*) 20 Hen. 6, 1.

(*q*) 18 Edw. 3, 23, cited in 10 Rep. 139 (b), Sty. 192.

(*r*) See a Tract on the Laws and Commissions of Sewers, p. 1.

But it should be remarked here, that the statute of Hen. 6, about to be cited as the first which, according to the received opinion, created a commission of sewers, was not by any means the origin of the legislative enactment concerning those matters by virtue of which commissioners of sewers now adjudicate. Lord Coke, when enumerating the statutes upon the subject, refers us to the days of Magna Charta for the first parliamentary declaration concerning defences against surrounding waters (*s*); then, after the passing of some other acts *in pari materia*, commissions followed: first, by virtue of the king's prerogative at common law; and, secondly, by statute.

There are, says Lord Coke, three manner of statutes which concern sewers; the first consists in maintaining and repairing walls, sewers, &c. The second, in destroying and removing nuisances. The third, which concerns both the points, as well in destroying as in maintaining (*t*).

This last sort includes the great statute 23 Hen. 8, and as the jurisdiction of commissioners is principally derived from that act, we shall take a very rapid glance at those preceding it.

By Magna Charta it is provided (*u*), that no town, nor free-man, shall be distrained to make bridges or banks, but such as of old time and of right have accustomed to make them in the time of King Henry our grandfather. And by the next chapter (*x*), no banks shall be defended from henceforth, but such as were in defence in the time of King Henry our grandfather, by the same places, and the same bounds, as they were wont to be in his time.* Again, by a subsequent chapter, it is declared, that all weirs from henceforth shall be utterly put down by Thames and Medway, and through all England, but only by the sea coasts (*y*).

(*s*) 10 Rep. 143.

(*u*) 9 Hen. 3, c. 15.

(*t*) Ibid.

(*x*) Cap. 16.

* It seems that the maintaining of these defences had been considered a special grievance, by many in particular who had been distrained without deriving any benefit from the improvement. This latter principle has been attended to in the construction of the statutes of sewers, as we shall see by and by.

(*y*) Cap. 23.

The two former of these chapters relate to the passage of the king's subjects, and to the defence of lands from the overflow of waters; the latter speaks of annoyances to navigation.

In the third year of Hen. 6, we find a commission granted to certain persons to reform the River Ley, running from Ware to the Thames (z); which commission touching the same river was afterwards extended to the counties of Essex, Hertford, and Middlesex (a).

Just about this time the first commission of sewers was made. By 6 Hen. 6, c. 5, it is declared, that our sovereign lord the king, considering the great damage and losses which now late be happened by the great inundation of waters in divers parts of the realm, and that much greater damage is very like to ensue, if remedy be not speedily provided, hath ordained and granted, that during ten years next ensuing several commissions of sewers shall be made to divers persons by the Chancellor of England for the time being, to be sent into all parts of the realm where shall be needful. The form of the commission next follows; but as the great statute of Hen. 8, which we shall set out presently, incorporates all the powers and authorities given by this act, it is sufficient to observe generally, that the commissioners were enabled by the statute of Hen. 6 to inquire of annoyances, of the defaulters, of such as had sustained losses from neglect to repair, and of such also as would derive benefit from such repair; and power was further given to distrain for these reparations. Several other matters were prescribed by the act, but it would be tantologous to mention them, because the statute to which we have just now adverted contains similar provisions.*

Nevertheless, this act is considered to be so far worthy of attention, notwithstanding the subsequent commission in the reign of Hen. 8, as that its provisions have been made the subjects of imitation ever since; and commissioners of sewers,

(z) 3 Hen. 6, c. 5.

(a) 9 Hen. 6, c. 9.

* Although Lincolnshire only was mentioned in this act, it was held to extend to all England. The county of Lincoln, where so many vast fens and marshes lay, stood most in need of such sewers. Callis, 27.

when acting upon the 23 Hen. 8, have frequent regard, in the exercise of their discretion, to the prior statute upon which, in fact, their authority is founded. And thus, it has been said, that the power of commissioners, as grounded upon this statute, is very extensive; for that the commissioners are thereby enabled to act according to their discretion, and the express words of the statute are mentioned to illustrate the case then before the Court (*b*).

And so, again, the 6 Hen. 6 was referred to in a case of assessment, and it was observed, that the last-mentioned act, on which the commission of sewers was formed and specified, had precise words in the same commission, namely, that no person of any estate or condition should be spared (*c*). And it is, moreover, said by Callis, that the statute of Hen. 6 was used by Sir Edward Coke in the pleading of Rooke's case, when he could make there no other use of it than by way of imitation, seeing that it had expired in point of time (*d*).

The benefit of these commissions of sewers began now to be substantially felt, and it was determined by the legislature, that they should be continued from time to time.

Accordingly we find a succession of statutes, now repealed (*e*), which enacted that certain commissions of sewers, all founded upon the original act of Hen. 6, should extend and continue for limited periods therein mentioned; and, afterwards, it being established to the satisfaction of the country, that the system was highly beneficial, the authorities of the commissioners were made perpetual.

It has been said concerning the act of 6 Hen. 8, that the great enactment passed in the twenty-third year of the same reign revived its predecessor; but Mr. Sergeant Callis conceives that the reviving words, in 23 Hen. 8, namely, "that all and every statute thereupon made concerning the premises,

(*b*) 4 Mod. 350. (*c*) In Rooke's case, 5 Rep. 100. (*d*) Of Sewers, p. 95.

(*e*) 18 Hen. 6, c. 10; 23 Hen. 6, c. 8; 12 Edw. 4, c. 6; 4 Hen. 7, c. 1; and as to the marshes of Calais, 25 Hen. 8, c. 10 s. 1; 6 Hen. 8, c. 10, repealed.

made in the time of the said king, or of any of his progenitors, not being contrary to that statute, should stand in force," could not set apart a statute expired in time, as was that of 6 Hen. 8 (*f*). And, therefore, observes the Sergeant, this statute is no interruption to our commissioner (*g*). For the purpose of explaining this circumstance, it may be added, that the qualification imposed by the stat. 6 Hen. 8 was the possession of lands and tenements of freehold, of the annual value of 20*l*.; whereas, that prescribed by 23 Hen. 8, and 13 Eliz. c. 9, required higher and different qualifications; and again, the stat. 3 & 4 Will. 4, c. 22, requires other qualifications, as we shall see hereafter in this chapter.

The attention of the reader must now be directed to the principal legislative ordinances upon this subject. Some alterations have occurred in subsequent enactments, and additions have been occasionally made to the existing law; but the statute 23 Hen. 8, c. 5, still continues to be considered the chief structure upon which the authorities and duties of commissioners of sewers have been reared, although the statutes 3 & 4 Will. 4, c. 22, 4 & 5 Vict. c. 45, and 24 & 25 Vict. c. 133, are likewise very important acts concerning sewers (*h*). We shall confine ourselves, in this chapter, to the nature of the commissions, to the appointment of the commissioners, their qualifications, discharge, &c., together with other matters relating to them, and to the continuance of the commissions under which the system of sewerage is carried on.

The statute
of sewers.
Commission,

First, as to the commission of sewers. It is enacted by 23 Hen. 8, c. 5, s. 1, that in consequence of the overflowing of the sea upon marsh grounds and other low places, and of land waters and springs upon meadows, pastures, and other places; in consequence, also, of obstructions created by mills, mill-dams, wears, fish-garths,* kedels,† gores,‡ gotes,§ flood-gates,

(*f*) On Sewers, p. 254.

(*g*) *Ibid*.

(*h*) And see 11 & 12 Vict. c. 63 (The Act for promoting the Public Health); 18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102.

* A dam or wear in a river, made for taking fish.

† An open wear, with a narrow cut in it, for the laying of wheels, or other engines, to catch fish.

‡ A wear.

§ A ditch, sluice or gutter.

locks, and other impediments upon rivers and watercourses, commissions of sewers shall be directed in all parts within this realm, from time to time, where and when need shall require, according to the manner, &c., following, to such substantial and indifferent persons as shall be named by the Lord Chancellor and Lord Treasurer of England, and the Chief Justice for the time being, or by three others, whereof the Lord Chancellor to be one.

Then follows the form of the commission (*i*), which we give verbatim.

Henry the Eighth, &c.—Know ye, that forasmuch as the walls, ditches, banks, gutters, sewers, gotes, calcies, bridges, streams, and other defences, by the coasts of the sea, and marish ground, lying and being within the limits of A., B., or C., in the county or counties of . . . or in the borders or confines of the same, by rage of the sea, flowing and reflowing, and by mean of the trenches of fresh waters descending, and having course, by divers ways, to the sea, be so disrupt, lacerate, and broken; and also the common passages for ships, balangers,* and boats, in the rivers, streams, and other floods within the limits of A., B., and C., in the county or counties of . . . or in the borders or confines of the same, by mean of setting up, erecting, and making of streams, mills, bridges, ponds, fish-garths, mill-dams, locks, hebbing-wears,† hecks,‡ and flood-gates, and other like lets, impediments, or annoyances, be letted and interrupted, so that great and inestimable damage, for default of reparation of the said walls, ditches, banks, fences, sewers, gotes, gutters, calcies, bridges, and streams; and also, by mean of setting up, erecting, making, and enlarging of the said fish-garths, mill-dams, locks, hebbing-wears, hecks, flood-gates, and other like annoyances, in times past hath happened, and yet is to be feared, that greater hurt, loss, and damage, is like to ensue, unless that speedy remedy be provided in that behalf. [Section 3.] We, therefore, for that by reason of our dignity, and prerogative royal, we be bound to provide for the

(*i*) 23 Hen. 8, c. 5, s. 2.

* Barges.

† Wears made or laid at ebbing water.

‡ Engines to take fish in the Ouse.

safety and preservation of our realm of England, willing that speedy remedy be had in the premises, have assigned you, and six of you, of the which we will that A., B., and C., shall be three to be our justices, during, &c.*

Duchy of
Lancaster.

There is some difference with respect to the appointment of the commissioners in the duchy of Lancaster, and in some other places. For example, it is provided, where a commission of this sort is issued within the fees, liberties or possessions of the duchy of Lancaster, that the commissioners shall be named by the lord chancellor and lord treasurer, the two chief justices, and the chancellor of the duchy; and further, that two commissions shall be awarded in every such case, and made according to the tenor of the commissions above expressed, one under the great seal of England, and the other under the seal of the duchy, as beforetime hath been accustomed (*k*). And again, by the eighteenth section of the same act, it is provided, that the commissions which are ordained in the case of the duchy of Lancaster should be adopted upon the issuing of commissions in any of the following places; namely, the fees, liberties, and possessions of the principality of Wales, the county palatine of Chester, and the fees, liberties and possessions of any other place where there is liberty and jurisdiction of county palatine.

By sect. 20. Provided always, that the chancellor, and such other as shall have the custody of the seals of the said principality of Wales, or the county palatine of Chester, or the fees, liberties and possessions of any other place where there is liberty and jurisdiction of county palatine, upon reasonable request, and upon the sight of the commission under the king's great seal of his chancery, shall without delay make out another commission, under the seal of the said county palatine, according to the tenor of the king's commission to them therein, under his great seal; and to those commissioners as shall be named by the lord chancellor, lord treasurer, and the two chief justices, or by three of them, whereof the lord chancellor to be one, except it be within the fees and liberties of the duchy of Lancaster,

* The duties of the commissioners are then mentioned; which will form the subject of our second chapter.

(*k*) 23 Hen. 8, c. 5, s. 14.

within which fees and liberties the commissioners shall be named, and commissioners made, as is afore obtained by this act.

Having set forth the duties of these commissioners, which we shall mention by and by, the act proceeds to save the king's fines in manner following :—Saved always to us such fines and amerciaments as to us thereof shall belong (*l*). The sheriffs of the several counties are then commanded to return sufficient jurors for the purpose of inquiring into matters brought under the jurisdiction of the commissioners, and the commission then concludes thus : commanding also all other ministers and officers, as well within liberties as without, that they and every one of them shall be attendant to see in and about the due execution of this our commission. In witness whereof we have caused these our letters patent to be made. Witness ourself at Westminster the day of in the year of our reign (*m*). Saving of fines.

And further, on the subject of fines, it was declared by 13 Eliz. c. 9, s. 6, that all the issues, fines, penalties, forfeitures, and amerciaments should be estreated annually into the Exchequer, upon pain of forfeiting five pounds for every default.

The expenses of these commissions are provided for by a subsequent section. And it is accordingly declared, that the said commissions shall be had and obtained without any money or other charge to be paid for the seal or writing of the same, unless it be to the king two shillings and sixpence for the seal of every commission, as hath been accustomed, and for the writing and enrolling of any one commission five shillings, and not above (*n*). Charges of commissioners.

By 11 & 12 Vict. c. 112, s. 1 (*o*), one commission of sewers might issue for the metropolitan districts of the city and liberties of Westminster, and the borough of Southwark, and all parts within the limits of certain commissions, dated 30th No-

(*l*) 23 Hen. 8, c. 5, s. 4.

(*m*) Ibid.

(*n*) Sect. 15.

(*o*) This jurisdiction was to cease after the commencement of the Local Government Act, 18 & 19 Vict. c. 120, s. 145.

venber, 1847, and 4th December, 1847, and the parts subject to the jurisdiction of the commissioners acting in the execution of 5 Geo. 4, c. 100. And such other parts or places in Middlesex, Surrey, Essex, and Kent, as were not more than twelve miles distant in a straight line from St. Paul's, but not being within the city of London, or the liberties thereof, were included in this commission.

Some portion of a limit of sewers may happen to be within a metropolitan commission. The statute 12 & 13 Vict. c. 93, s. 2, ordains, that, with the exception of the city of London, and the liberties thereof, the metropolitan commissioners should provide for the debts and liabilities of the portion above mentioned, and that the authority of the original commissioners within that portion should cease and determine.

The commissioners of sewers for the city of London were, by 15 & 16 Vict. c. 85, s. 43, to be a burial board for the parishes in the city and its liberties (*p*).

However, by 18 & 19 Vict. c. 120, s. 68, sewers (except main sewers), are vested in the vestry or district board. The board may repair sewers and construct new (*q*), and do works of improvement, the expense being divisible between the party and the district (*r*). Gully-holes (*s*) and sewers are to be cleansed (*t*). Owners must construct drains to fall into the common sewer (*u*). Groups of houses are to be severed (*v*); and no house is to be built without drains, &c. (*x*); nor without notice of building being given to the vestry or district board upon pain of demolition or alteration. But the board must not demolish a house without giving notice to the owner. For want of this care the board was held liable (*y*). The board may cause all offensive ditches, &c., to be cleansed or covered (*z*); and substitute pipes by the sides of roads instead of

(*p*) And this right seems to be saved to them by 18 & 19 Vict. c. 120, s. 242.

(*q*) Sect. 69. (*r*) Sect. 70. (*s*) Sect. 71. (*t*) Sect. 72.

(*u*) Sect. 73. (*v*) Sect. 74. (*x*) Sects. 75, 76—80.

(*y*) *Cooper v. Wandsworth Board of Works*, 14 C. B. 180; 32 L. J., C. P. 185; 9 Jur., N. S. 1155.

(*z*) 18 & 19 Vict. c. 120, s. 86.

ditches (*a*). Every vestry or district board may transfer their powers of sewerage to the Board of Works (*b*). The main sewers are vested in the Metropolitan Board of Works, who are to submit plans. The Metropolitan Board may declare sewers to be main sewers, and control vestries and boards (*c*). The jurisdiction of the metropolitan commissioners was to cease (*d*). Actions were not to abate (*e*). And rates to be recoverable (*f*). The property to be transferred to the Board of Works (*g*). Their liabilities (*h*) are provided for. Powers to borrow for this purpose being given to the Metropolitan Board (*i*). Under section 181 the Board of Works, in default of the overseers, has been held competent to appoint a person to make a rate over parishes beyond the metropolis, but being within the limits of the Metropolis Sewers Act (*j*), but not for "defraying the expenses of the board in the execution of the act (*k*).

The Local Management Act was further improved by 21 & 22 Vict. c. 104. By sect. 1, the main drainage of the metropolis was ordered to be carried out as soon as possible by the board. By sect. 2, the board might construct works on the bed, soil, banks and shores of the Thames, making compensation under the 18 & 19 Vict. c. 120. The 3rd section extends the powers of taking land under that act to works for deodorizing sewage. The 4th section directs the mode of borrowing a sum not exceeding three millions (*l*); and the 5th points out the mode of raising money to repay the principal. By sect. 6, the guarantee of the treasury is given for the payment of monies borrowed for the purpose. By sect. 7, all bonds, debentures and securities under the act shall be transferable by delivery. By sect. 8, the money so borrowed shall be confined to the works done under the act,

(*a*) Sect. 87.

(*d*) Sect. 145.

(*b*) Sect. 89.

(*e*) Sect. 146.

(*c*) Sects. 135—138.

(*f*) Sect. 147.

(*g*) 18 & 19 Vict. c. 120, s. 148. See the List of the Liabilities, 25 & 26 Vict. c. 102, Schedule A.

(*h*) *I. e.*, of the Metropolitan commissioners.

(*i*) Sects. 180, 181, 187. Their improvement rates, sect. 182.

(*j*) *R. v. Glossop*, 32 L. J., M. C. 92. See sect. 168.

(*k*) *R. v. Ingham*, 32 L. J., M. C. 214; 9 Jur., N. S. 1288. The parish was liable to pay a mortgage.

(*l*) And one million two hundred thousand pounds more, with consent and in manner provided by 21 & 22 Vict. c. 104; 26 & 27 Vict. c. 68, s. 2. See sects. 3—5, which give the Main Drainage Act as the guide as to the construction of the Act, and the application of monies.

and separate abstracts and statements shall be prepared by the auditors. By sect. 9, the treasury may appoint an engineer to inspect the works, and to report. Such engineer may then survey them and inspect the accounts of the board respecting them. By sect. 10, a rate of three-pence in the pound may be levied for forty years, taking the county rate as the basis of the estimate. It is, by sect. 11, to be called "The Metropolis Main Drainage Rate." In the city of London it is to be raised and reimbursed to the chamberlain by a separate rate, to be levied under the direction of the commissioners of sewers under the powers of the City Sewerage Acts. Out of the city it is to be levied, as under the 18 & 19 Vict. c. 120, also by a separate rate (*l*). By sect. 12, all parts of the metropolis shall be deemed to be equally benefited. The 13th section refers to the schedule for the forms of the assessment (*m*) and precepts (*n*). By sect. 14, the provisions applicable to other assessments of the board shall be applicable, if consistent, to this act. By sect. 15, if the vestries, &c. make default, the board may make the rate, and levy it as the poor's rate is leviable, subject to the levying of money by overseers under 18 & 19 Vict. c. 120. Collectors may also be appointed, with security, by the board. The poor's rate is mentioned as the general guide; and, lastly, the sections of the 18 & 19 Vict. c. 126, ss. 163, 164 and 169 shall be applicable to rates under this act. By sect. 16, the provisions of 18 & 19 Vict. c. 120, s. 171, are extended to all other rates within the metropolis. The 17th section enables the board to require copies of poor's rates from vestry clerks, overseers, &c., under a penalty of ten pounds for refusal, or for refusing to verify such copies by a solemn declaration. By sect. 18, a separate account is to be opened at the Bank of England in respect of the rate. By sect. 19, all monies paid to the credit of such account shall be paid into the Bank. By sect. 20, monies arising from rates may be applied in lieu of money raised by loan. Then the 21st section enables the treasury to make payments in pursuance of their guarantee. However, under sect. 22, if the amount advanced should be paid within the term of forty years, the rate shall be discontinued, and any surplus applied to the expenses of the board. The 23rd section empowers the board to deodorize sewage and defray expenses, as under 18 &

(*l*) See Schedule C. of 18 & 19 Vict. c. 120.

(*m*) Schedule A.

(*n*) Schedule B.

19 Vict. c. 120. The 24th section forbids the board from creating a nuisance by such a process. Then follows (sect. 25) the repeal of 18 & 19 Vict. c. 120, s. 136, and so much of sect. 144 as requires the sanction of the Board of Public Works and of Parliament before certain works are commenced. The time for completing works under 18 & 19 Vict. c. 120, s. 135, is extended to December 31, 1863 (*o*). But, by sect. 27, no works upon the bed or shore of the Thames below high water-mark shall be constructed, unless approved by the admiralty; nor, by sect. 28, upon the banks, bed or shore of the river, unless approved by the conservators as not interfering with the free navigation thereon. The 29th section saves the rights of the conservators. The 30th section restrains works on the River Lea, unless certain conditions are complied with in constructing them. By sect. 31, if there be a complaint of nuisance, any secretary of state may order a prosecution. The 32nd section defines "deodorize" and "sewage." The 33rd declares that this and the 18 & 19 Vict. c. 120, shall be read as one act (*p*).

An action was brought against the board for injuries received by a ship in consequence of piles driven into the bed of the river. The first count alleged the wrongful carrying on of the works; the second, negligence in constructing them. The defendants pleaded, first, not guilty; and, secondly, a justification under the statutes. A verdict passed for the plaintiffs, and the Court sustained it as to the first count, the plaintiffs agreeing that a verdict should be entered on the second count for the defendants, on the issue of not guilty. This was a public nuisance created in a public navigable river without the consent of the admiralty (*q*).

Another act, 25 & 26 Vict. c. 102, may be usefully consulted, especially with reference to the main drainage rate (*r*). By

(*o*) Sect. 26, and to Dec. 31, 1866, by 26 & 27 Vict. c. 68, s. 6. The Board has no power, under sect. 135, to turn the sewage of a district into a navigable river where there has been no such drainage before, so as to create a nuisance. *Att.-Gen. v. Metropolitan Board*, 11 W. R. 820.

(*p*) "Deodorize." Any process whereby the solid "suspended matters in sewage may be precipitated or separated from the liquid before the discharge thereof, or whereby the noxious or offensive properties of sewage may be neutralized." "Sewage." The contents of the sewers before such process.

(*q*) *Brownlow v. Metropolitan Board*, 13 C. B. 768; 31 L. J., C. P. 140; 8 Jur., N. S. 891.

(*r*) See sects. 1—18.

sect. 27, gullies connected with main sewers are not to be trapped without consent of the board. By sect. 28, notwithstanding 18 & 19 Vict. c. 120, s. 89, the consent of the Metropolitan Board must be had before the powers of sewerage are transferred. The 30th section ratifies improvement rates made by the Metropolitan Commissioners of Sewers. By sect. 32, intercommunications of sewers in different parishes, and compensations apportioned to the benefit, are provided for. By sect. 44, owners and occupiers may construct drainage works at their own expense, and they may have contribution from vestries or districts, if it be thought fit (*r*). By sect. 45, plans of new sewers must be submitted by the vestries, &c. to the Metropolitan Board. By sect. 46, before any communication between a sewer and the main drainage, three clear days' notice must be given to the board; and, under sect. 47, a private person must have the sanction of the vestry or district board before he meddles with the main sewer; and, on their part, the vestries, upon such an occasion, must obtain the approval of the board (*s*). Of this last work seven clear days' notice must be given to the vestry, and it may not be commenced until the consent of the vestry in writing shall have been obtained (*t*). The 50th section provides for abandonment, extension, contraction or alteration of sewers. By sect. 51, if an approved sewer be not constructed within twelve months, a fresh application must be made. The 52nd section directs how the expense of making sewers in new streets shall be borne. The 53rd speaks of such expenses in streets where there has been no sewer, or only an open sewer (*u*).

The 58th section enables vestries and district boards to execute sewerage works beyond the metropolis limits, but not without the sanction of the Metropolitan Board. The 59th section treats of contribution towards the main drainage and any sewer built since January 1st, 1853, or any future sewer hereafter built (*x*). The 61st section, repealing 18 & 19 Vict. c. 120, s. 77, regulates more particularly the openings into

(*r*) An express power to defray expenses is given by sect. 56.

(*s*) Sect. 48.

(*t*) Sect. 49.

(*u*) The 57th section gives an appeal to the Board of Works. See also sects. 54, 55, as to expenses.

(*x*) See also sect. 60.

sewers. By sect. 64, if parties do not perform, amongst others, sewerage works, they become liable to penalties, which will be found in that clause (*y*). The 66th section is a drainage clause where there is no proper sewer within 200 feet. The 68th section imposes penalties upon persons erecting any building, &c., on sewers within the jurisdiction of the Metropolitan Board. And by sect. 69, penalties are awarded against persons in any way meddling with sewers without the sanction of the Metropolitan Board or vestry.

By sect. 83 the Metropolitan Board may make bye-laws for the control of vestries in the construction of sewers. By sect. 84, whilst, among other works, those of sewerage are being made, the vestry may close the streets with the assent of the board. The 112th section is the interpretation clause. The 116th section saves the rights of the Crown and of the Duchy of Lancaster, and the 117th those of the Duchy of Cornwall.

Further, by 18 & 19 Vict. c. 120, s. 204, no buildings are to be made over any sewer without consent. And scavengers may not, under a penalty of 5*l.*, sweep dirt therein (*z*). Retiring allowances are given to persons acting under old commissions (*a*). The powers of the city commissioners of sewers are saved (*b*), and of the Metropolitan Sewage Manure Company (*c*). Interpretation of "sewer," "drain" (*d*). An under-lessee is liable to drainage works done under 18 & 19 Vict. c. 120 (*e*). A marsh wall and an embankment is a sewer within sect. 204 (*f*). Under sect. 135, the commissioners are not bound to purchase lands for the purposes of sewerage, notwithstanding sects. 150—152. They are only compelled to make compensation (*g*).

The old Metropolitan acts are referred to in the note (*h*).

(*y*) See sect. 65.

(*b*) Sect. 242.

(*z*) Sect. 205.

(*c*) Sect. 243.

(*a*) Sect. 213.

(*d*) Sect. 250.

(*e*) *Sweet v. Seager*, 2 C. B. 119.

(*f*) *Poplar Board v. Knight*, 28 L. J., M. C. 37; *Horne v. Farmer*, cor. Lord Tenterden, 1816, Woolrych's Local Management Acts, p. 128.

(*g*) *North London Railway Company v. Metropolitan Board of Works*, 28 L. J., Ch. 909.

(*h*) 11 & 12 Vict. c. 112; 12 & 13 Vict. c. 93; 14 & 15 Vict. c. 75; 15 & 16 Vict. c. 64; 17 & 18 Vict. c. 111.

W. . .

C

We now propose to call the attention of the reader to the 11 & 12 Vict. c. 63,* which, by sect. 1, may be applied to any part of England and Wales,†—The Act for Promoting the Public Health. We have only to do with it as it regards sewerage and drainage, and yet we must enter somewhat at large into its provisions in order to make those clauses which relate to sewers intelligible to the reader. For it will materially interfere with the powers of the commissioners of sewers in those places where its powers are called in aid. The bill for promoting the health of cities, towns, and populous places, creates a jurisdiction analogous to that of commissioners of sewers. The preamble treats, amongst other things, of the expediency of consolidating the local management and control of the supply of water, sewerage and drainage, within towns and populous places, subject to the general supervision provided by the act. First, there was the General Board of Health, now represented by the Privy Council; and, secondly, there is the Local Board of Health, which is the more important and working body. The General Board of Health was for the most part amalgamated with the Privy Council by 21 & 22 Vict. c. 97. That board was discontinued, and the powers given by the “Diseases Prevention Act, 1855,” were vested by sect. 1, in the Privy Council (*i*). Then by 21 & 22 Vict. c. 98, s. 5, the provisions of the act and of 11 & 12 Vict. c. 63, are to be construed together. By sect. 6, local boards are to have all powers belonging to the 11 & 12 Vict. c. 63. Sect. 8 provides for the change of sanction from the General Board to the provision of this act. Sect. 9 saves all contracts under 11 & 12 Vict. c. 63. By sect. 10, if there be a failure in electing a local board, the power of appointment of a receiver under 11 & 12 Vict. c. 63, s. 14, may be exercised. By sect. 11, if there be a failure of such election, or any lapse, the owners and rate-

* See the interpretation clause, sect. 2, “sewer” and “drain.”

† Except, 1. The City of London. 2. The parts within the limits mentioned in certain commissions of sewers, dated 30th November, and 4th December, 1847, at Westminster, and the parts within the Regent's Park Acts (5 Geo. 4, c. 100; 6 Geo. 4, c. 38; 9 Geo. 4, c. 64; 2 Will. 4, c. 56). However, the Regent's Park Acts were repealed by 11 & 12 Vict. c. 112, ss. 142, 143 (the Metropolis Sewers Act).

(*i*) This statute was made perpetual by 22 & 23 Vict. c. 97. By sect. 3, Scotland and Ireland are excepted, and the Local Management Act, 18 & 19 Vict. c. 120. See as to interpretation and construction, ss. 2, 7.

payers may elect with the same qualification as to property and rating as the lapsed board, and from the date of the election all powers of a receiver under sect. 10 shall determine.

The 16th section speaks of boundaries. The 17th section gives power to appeal against the adoption of the act (*k*). Notice of the adoption is to be given to the Secretary of State (*l*). The next clauses relate to the time when the act is to take effect, to objections, proof of adoption and costs (*m*).

We then come to the constitution of local boards. By sect. 24, the duty under the act shall be executed by a local board, and the section proceeds to explain the mode of its constitution. The 25th section narrows the disqualifications mentioned in the 11 & 12 Vict. c. 63 (*n*). By sect. 27, districts may unite with the sanction of a Secretary of State. By sect. 28, works may be executed, with consent, in adjoining districts. By sect. 29, if it appear to a local board that premises were sufficiently drained before the construction of a new sewer, such a sum as the board may think fit may be deducted from the rates. The 30th section places the sewage at their disposal (*o*). Sect. 31 provides for offensive watercourses and ditches near the boundaries of districts. By sect. 32, the local board may contract for cleansing, and may make bye-laws as to nuisances. By sect. 33, if any drain, &c. be out of order, the surveyor need not to have the ground closed before the necessary works are set about, provided they be forthwith commenced. The 38th section provides for the sewerage of streets which are not parts of highways.

The Metropolitan Board of Works was constituted by 18 & 19 Vict. c. 120, s. 43.

And, amongst other things, all rights saved to commissioners of sewers by parliament were by 18 & 19 Vict. c. 120, s. 210, saved to the Metropolitan Board.

By sect. 12, the act may be adopted in corporate boroughs to which the act has not been applied, or where there is

(*k*) And see sect. 18, as to the appeal to the Secretary of State.

(*l*) Sect. 19.

(*n*) Sect. 26.

(*m*) Sect. 20—23.

(*o*) *Post*, p. 132.

Page Missing in Printing and Binding

a board of improvement commissioners being such by election.

In all other places where there is a known or defined boundary there must be a week's notice for adoption (26 & 27 Vict. c. 70, ss. 7, 8). The 13th section relates to the meetings. The 15th section admits of a partial adoption of the act.

And it is to be particularly noted, that the Act of 1858, (21 & 22 Vict. c. 98,) does not apply to places where there is already a local board (*p*), and, therefore, we must retain several clauses of the 11 & 12 Vict. c. 63, however difficult the complication of the Sewers' statute law may have rendered the subject. Yet although the powers of local boards are preserved (*q*), the provisions of the statute of 21 & 22 Vict. took effect from the 1st September, 1858 (*r*).

The origin of the general board being thus ascertained, the statute proceeds to mention the second or working jurisdiction, namely, the Local Board of Health. Certain persons, *ex officio*, were to be members of this board in boroughs, as the mayor, aldermen, &c.: in other cases, the owners of property* and ratepayers are to elect the board. The board may, however, consist of two corporations, or part thereof, or of corporate and non-corporate parts. In these cases there are to be *ex officio* and selected members in the one, and in the other, the members of the board are to be composed of some *ex officio*, some selected from the councils, and the rest elected from the non-corporate parts. This board is a very important body. The powers which they exercise are various, and clothed with authority, so much so that many decisions in our Courts have been elicited by arguments on either side of the question as to the extent of their powers. These, as far as they relate to the law of sewers, will be found in the course of the work.

(*p*) Sect. 12.

(*q*) 21 & 22 Vict. c. 98, ss. 5, 6.

(*r*) Sect. 5.

* The owner means the person who receives the rack-rent, or who would be entitled to receive it if the premises were let at a rack-rent. (Sect. 2.)

The 12th and 13th sections of the statute enter fully into the nature of the appointments and of the elections. First, by the 12th section:—in all boroughs or parts thereof (Oxford and Cambridge are excepted) (*n*), the mayor, aldermen, and burgesses shall, by the council, be the local board, and such council shall exercise the powers of the act in conformity with the laws in force with respect to municipal corporations in England and Wales (*o*). Again, if the district consists exclusively of two or more boroughs, or of one borough and part of another, or exclusively of part of two or more, the local board is to be selected thus:—the mayors for the time being, and such persons as the councils may select from their own body, or from persons qualified to be councillors—the number of them being fixed by the provisional order.

But there is still another case. There may be a district which comprises the whole or any part of a borough or of boroughs, and yet likewise parts not within the borough boundaries. In this last case, the mayor or mayors for the time being, and a limited number selected from the councils respectively, or from persons qualified to be councillors, shall form the board, together with a certain number elected in respect of the non-corporate parts. By sect. 32, if trustees or commissioners under any local act are constituted the local board by any provisional order, the provisions as to election, &c., shall not apply to them. And by sect. 33, if any district should become a corporate borough, the mayor, &c., shall be the local board.

To proceed with the 12th section. The day for the selection of the council members shall be fixed by Parliament (being under a provisional order), and the continuance of office shall be as long as the party remains, without re-election, a member of the council, but not longer, or where the elected member is not one of the council, for one year, and no longer. Should there be a vacancy, it shall be filled up within one month: and each meeting under the act shall be deemed to be a meeting under the Municipal Act, 5 & 6 Will. 4, c. 76.

The 13th section enters more particularly into the election of

(*n*) See sect. 31, *post*.

(*o*) See 5 & 6 Will. 4, c. 76.

the members for the non-corporate parts ; and also governs the case of such districts as are quite independent of any corporation. In the first case, *i. e.*, where the districts are composed of corporate and non-corporate portions, a certain number of persons qualified* under the act (*p*), the number to be fixed by a provisional order, shall be elected by the owners of property and ratepayers (*q*), and shall serve in conjunction with the persons selected by the councils as members of the local board. In the second case, *i. e.*, where there are no corporate parts, and where the act is applied by an order in council, such a number of persons shall be elected as the order shall express ; and in cases where the act proceeds under a provisional order, such a number as that order shall direct shall be elected.

The day of election (as well as that of selection) is to be fixed by an order in council, or by a provisional order, as the case may be ; and so again, in like manner, in each year, when one-third of the elected shall go out of office, and be succeeded by an equal number of other persons elected in a similar way, together with any others who may be wanting to fill up the number.

The order for going out of office is to be settled by the local board. However, the number of members elected may not happen to be divisible by three. In that case the proportion shall be regulated by the order in council, or the provisional order, so as that as nearly one-third as may be shall be annually changed. Again, the number elected may be less than three. In such a case the persons elected shall likewise go out according to the orders aforesaid respectively, but no one is to go out before his year of office is expired. And in all cases, no person

* The qualification is thus (sect. 16): 1. Residence within the district, or within seven miles thereof. 2. Being seised or possessed of real or personal estate, or both, to the limit or amount fixed by the order in council or provisional order ; or 3. Residence and rateability to the poor of some parish within a district, or part of a district, upon such annual value as such orders respectively may fix. But the limit of the estate shall not exceed 1,000*l.*, nor of the rating 30*l.* per annum. Then follows a provision in favour of tenants in common, whose united interests would make up 2,000*l.*, or 60*l.* per annum ; but the same property shall not qualify both the owner and occupier. As to the Qualification of Electors, see sect. 20.

(*p*) Under sect. 16, and see sects. 17, 18, 19.

(*q*) Sect. 20 ; see sects. 21, 22.

elected shall remain in office for a longer period than three years.

The 15th section has the following provisions. The number of the local board generally for a district shall be regulated according to the exigency of the district by the order in council or provisional order, as the case may be. A member resigning or otherwise going out of office may, if qualified, be re-elected. And, in the event of a vacancy, the remaining members of the board are to have the same powers as though their numbers were full.

A person may be both elected as well as selected. If so, he must choose under which title he will serve. If he should not, the board shall determine his title, and his office, as it respects the other title, shall become vacant. By sect. 15, there is this modification. Supposing a corporate borough to be included, for the purposes of public sewerage only in a district containing parts without the borough, and that such independent parts are a district for other purposes of the act, the persons elected for such sewerage district shall, within the separate district for which they have been elected, be the local Board of Health without further election.

The 31st section saves the jurisdiction of the Oxford and Cambridge Commissioners. The 52 Geo. 3, c. lxxii, invested certain commissioners with powers to make improvements and do other acts within the university and city of Oxford; and the stat. 34 Geo. 3, c. civ, conferred similar powers upon certain persons within the borough of Cambridge. Then, should Oxford or Cambridge respectively become districts within the act, the Oxford and Cambridge Commissioners shall respectively by the Local Board of Health (*r*).

Having now set forth the jurisdiction of these boards, that is to say, of the General and Local Boards of Health, we proceed to mention the matters connected with the law of sewers which the statute draws within their jurisdiction.

All public drains and sewers are in the first instance and at

(*r*) Sec 21 & 22 Vict. c. 98, s. 82.

once placed absolutely under their control. The 43rd section is very general upon this head. It vests in the Local Board of Health of the district and places under their management, all public sewers and drains (whether existing at the time when the act passed, or made subsequently), together with all buildings, works, materials, and things belonging or appertaining thereto. There are exceptions of private sewers and drains, and drains made by private persons for profit, and drains belonging to commissioners of sewers.

By sect. 44, the local board may buy vested rights for making sewers, or may contract for the use of sewers within their districts, or they may buy the same with or without buildings, &c. Still, any person having a perpetual right to use any such sewer may use any such sewer or substituted sewer as though no such purchase had been made.

By sect. 120, an appeal is allowed in certain cases from the decisions of the Local to the General Board.

The 121st section is in aid of the superintending inspector, who may summon and examine witnesses, and call for surveys, plans, rate-books, &c., and exercise other powers of supervision in execution of the statute.

Moreover, by sect. 143, entry upon lands after twenty-four hours' notice is permitted for the execution of matters under the act to the following officers: the superintending inspector; the local board, or any member thereof; the surveyor and inspector of nuisances, and any person authorized by them. For the duties and powers with which these boards are invested the reader is referred to the next chapter, where they will be found fully set forth.

By sect. 144, full compensation shall be made out of the district rates to persons sustaining damage by reason of the execution of the powers of the act. It may either be settled by arbitration (*r*), or if the compensation claimed do not exceed

(*r*) See sect. 123, &c.

20*l.*, it may be ascertained before a justice in a summary manner (*s*).

And, lastly, by sect. 151, all advertisements, papers, publications, deeds, &c., and all instruments are exempted from stamp duty.

[The statute 24 & 25 Vict. c. 133.]

Commissions of sewers may likewise be issued under the Drainage Act of 1861 (*t*). By sect. 2, this act shall include any commission of sewers, whether granted or not under this act, or whether previously granted or not. With regard to new commissions under the statute, the Inclosure Commissioners are set in motion. By sect. 4, upon their recommendation, commissions may be issued for new areas, inland as well as maritime, and the limits assigned, regard being had to the levels and other facilities of drainage, and there may be an area where no commission has previously existed, or one wholly or partially within the limits of an existing commission. But in this latter case, no alteration can be made affecting the jurisdiction of commissioners without their consent at a special meeting. Now, in order to obtain the recommendation of the Inclosure Commissioners, by sect. 5, there must be a petition signed by one-tenth part of the proprietors of the land within certain boundaries, to be set out in the petition referring to a map. The Inclosure Commissioners shall decide upon the necessary evidence, and upon security for costs. The Inclosure inspector then inquires concerning the genuineness of the petition, the propriety of the boundaries, and as to the assentients and dissentients. Notice must be given by the inspector as the commissioners may direct, and of time and place for a hearing, and of a further time, not less than fourteen days, for expressions of dissent. The dissent of one-third will be fatal to the petition. It must be in writing and sent within the time to the commissioners. In the absence of dissent, and with the approval of the commissioners, on hearing the report of the inspector, as to the boundaries, a commission as pro-

(*s*) See sect. 129, &c.

(*t*) 24 & 25 Vict. c. 133, confined to England. Nevertheless, the Queen may issue commissions of sewers as before this Act: sect. 60.

posed or as modified by the commissioners may issue. The 6th section defines the proprietors :—

The following persons shall be deemed to be proprietors for the purposes of this act ; that is to say,

- (1.) Any person entitled for his own benefit, at law or in equity, for an estate in fee, to the possession or receipt of the rents and profits of any freehold or copyhold land, whether such land is or not subject to incumbrances :
- (2.) Any person absolutely entitled in possession, at law or in equity, for his own benefit, to a beneficial lease of land of which not less than twenty-five years of unexpired, whether such land is or not subject to incumbrances ; but no lease shall be deemed to be a beneficial lease, within the meaning of this act, if the rent reserved thereon exceeds one-third part of the full annual value of the land demised by such lease :
- (3.) Any person entitled under any existing or future settlement, at law or in equity, for his own benefit, and for the term of his own life, or the life of any other person, to the possession or receipt of the rents and profits of land of any tenure, whether subject or not to incumbrances, in which the estate for the time being subject to the trusts of the settlement is an estate for lives or years renewable for ever, or is an estate renewable for a term of not less than sixty years, or is an estate for a term of years of which not less than sixty are unexpired, or is a greater estate than any of the foregoing estates :
- (5.) Any body corporate, any corporation sole, any trustees for charities, and any commissioners or trustees for ecclesiastical, collegiate, or other public purposes, entitled at law or in equity, in the case of freehold estates or copyhold estates in fee, and in the case of leasehold estates to a lease for an unexpired term of not less than sixty years.

By sect. 7 (*u*), Guardians, committees, or husbands, may be

(*u*) "Settlement" shall include any Act of Parliament, will, deed or other assurance whereby particular estates or interests in land are created with expectant remainders or interests. Sect. 6.

proprietors, and a married woman, entitled for her separate use, and not restrained from anticipation. In the case of corporations, joint stock companies, or other body of proprietors, they shall have but one vote of assent or dissent, which they may express under their common seal, or under the hands of three directors or others (v). The 9th section provides for joint tenants, coparceners, and tenants in common, in undivided moieties; they shall count as one proprietor, provided that there be a concurrence of two-thirds. If there be no proprietor, or if none can be found in respect of any land, it shall be included in the computation (x). By sect. 11, power is given to the inspector to compel appearance upon summons and examine upon oath, and he may require the production of surveys, plans, sections, rate books and documents from parish officers, or officers of corporations, directors, or directors of the poor, or commissioners, justices, officers, or persons acting under any Local Act. . . . The inspector may examine and take copies of these instruments. Then a penalty of 5*l.* is awarded for disobedience or obstruction, or refusal to answer questions, to be recovered summarily. Before attendance, however, reasonable charges must be paid or tendered. The 12th section imposes the costs with regard to the commission on the rates, if it be successful, but otherwise, on the petitioners. . . . The 13th section makes the issuing of the commission conclusive as to all the requirements of the act.

There are also local statutes, for instance, in populous towns, where powers are delegated to commissions, The City of London Sewers Act (y), The Brighton Improvement Act (z). And powers are given by the act 25 & 26 Vict. c. 102, ss. 32, 46, 80, to amend the Metropolis Local Management Act. The Scotch Act, 25 & 26 Vict. c. 101, is also referred to (a).

We have thus explained the object of these commissions,

(v) Sect. 8.

(x) Sect. 10.

(y) 11 & 12 Vict. c. clxiii. See on the construction of this statute, Moss, app., Commissioners of Sewers for London, resps., 4 El. & Bl. 570; 24 L. J., M. C. 84.

(z) 50 Geo. 3. See *Mills v. Funnell*, 2 B. & C. 899; 4 Dowl. & Ry. 561.

(a) The Local Acts, which are numerous, are collected with great industry and accuracy, by Mr. Woolrych, the police magistrate, who was secretary and counsel to the Board of Sewers, and secretary to the Metropolitan Board of Works. Metropolitan Management Act, p. xxxii.

Qualification
of commis-
sioners of
sewers.

namely, to restrain the rage of the sea and the inroads of fresh waters, and to destroy impediments to navigation. The form of the commissions, varied as they are in particular jurisdictions, has been mentioned, together with the personal expenses attending the procuring of them. We now proceed to speak of an important topic, and that is the qualification of the individuals who are appointed to be commissioners of sewers. And it appears, that in order to sit for the execution of their duties they must either be possessed of a certain estate, which we shall immediately notice, or claim by virtue of their office, and, excepting *ex officio* commissioners, must also take an oath to fulfil their office honestly, diligently, and impartially. There are also some other provisions upon this subject, respecting particular persons, which may rather be considered as prohibitions than qualifications.

By estate.

With respect to the qualification by estate, considerable alteration has been made by the statute 3 & 4 Will. 4, c. 22. That statute enters fully into the qualification of future commissioners, leaving untouched, however, the qualifications of such as had acted as commissioners under commissions then existing. This act of William recognises the 23 Hen. 8, c. 5, the 3 & 4 Edw. 6, c. 8, and the 13 Eliz. c. 9, and then goes on to provide, That no person who has not already acted as a commissioner under any commission of sewers already issued shall be qualified or capable of becoming or acting as a commissioner in the execution of any commission of sewers, unless such person shall be, in his own right or in right of his wife, in the actual possession or receipt for life or for a larger estate of the rents and profits of lands, tenements or hereditaments situated in the county in which he shall act as a commissioner, or in any adjoining county, of freehold or copyhold tenure, or held for a term of not less than sixty years absolute, or determinable with a life or lives of the clear yearly value of one hundred pounds above reprises, or held for a term of years originally granted for not less than twenty-one years, and of which ten years at the least shall then be unexpired, of the clear yearly value of two hundred pounds above reprises, or shall be heir apparent of a person possessed of freehold or copyhold lands, tenements or hereditaments, situated in such county as aforesaid, or in any

adjoining county, of the clear yearly value of two hundred pounds above reprises, or unless such person shall be the agent duly appointed by writing under the seal of any body politic or corporate, or under the hand of any person not being himself present, and acting as a commissioner in the execution of the commission of sewers under or by virtue of which such agent shall act; and which body politic or corporate shall for the time being be in the receipt of the rents and profits of freehold or copyhold lands, tenements or hereditaments situated in such county as aforesaid, or in any adjoining county; and which person making such appointment shall for the time being be, in his own right or in right of his wife, in the actual possession or receipt of the rents and profits of freehold or copyhold lands, tenements or hereditaments, situated in such county as aforesaid, or any adjoining county, and which lands, tenements or hereditaments, whether so belonging to such body politic or corporate, or to such other person, shall be actually taxed under or by virtue of the commission of sewers in respect whereof such agent shall act, and shall be of the clear yearly value of three hundred pounds above reprises, or unless such agent shall, before he acts, deliver his written appointment to the clerk to such commission of sewers, or his deputy, to be filed by such clerk among the records or proceedings of the commissioners acting in the execution of such commission: Provided always, that in cases where commissions of sewers run into more than one county, the qualification hereinbefore provided may be situated either partly in each of the counties into which such commission shall run, or wholly in any one of such counties: Provided that nothing in this act contained shall extend to give a qualification to any person as agent after he shall have ceased to be such agent (*b*).

The statute of Henry the Eighth acquaints us with the nature of the qualification upon which the commissioners acting at the time of the passing of the statute of Will. 4, would rely. By the 10th section of 23 Hen. 8, it was enacted, That if any person do sit, not having lands and tenements, or other hereditaments in fee simple, fee tail, or for term of life, to the clear yearly value

(*b*) 3 & 4 Will. 4, c. 22, s. 1.

of forty marks* above all charges, to his own use, he shall forfeit forty pounds for every time that he shall attempt to do so; half to the king, half to him who will sue for the same by action of debt, bill, plaint or information in any of the king's courts; in which action or suit no wager of law shall be admitted, nor any essoin or protection shall be allowed. There were, however, the following exceptions to this rule:—1. Resiants and freemen of any city, borough or town corporate, having immoveable substance of the clear value of 100*l.* (c); and, 2. An utter barrister at law. Consequently, the following persons were qualified according to the above statute:—Persons having certain estates of forty marks per annum, freemen of cities, &c., and barristers.

It may be noticed, that a further restriction as to the qualification of *lessees for years* was imposed by the 13 Eliz. c. 9, s. 4. By that section, no farmer for term of years, of any manors, lands or tenements, lying or being within the precincts or limits of any such commission of sewers, which be, or hereafter may be ordered, &c., not having estate of freehold within the realm of England, of or in manors, *lands or tenements of the yearly value of 20*l.**, shall at any time hereafter have power to sit, or in anywise intermeddle with the execution of such commissions, during the time he shall continue to be such farmer, and shall not have estate of freehold as is aforesaid. Every such commission, as having respect only to every such person during the time of his continuing to be a farmer as before mentioned, shall be deemed and adjudged to be void, anything in the said commission, &c., to the contrary notwithstanding. Nevertheless, a subsequent section contains the following proviso. Provided always, that it shall be lawful for any commissioner, being also a farmer, and [not]† having lands and tenements to the clear yearly value of forty pounds of freehold, to sit by virtue of the said commission, and have his voice and full authority with others to make and establish ordinances for sewers, according to the terms of the commission touching and concerning all

* £26 : 13*s.* 4*d.*

(c) See Callis, 234—241.

† The word *not* should be omitted in this place; see *post*, immediately in this chapter.

lands and tenements within the precinct of every such commission, other than such lands and tenements as he or they, for the time being, hold and enjoy as farmer, as he or they might have done before the making of this statute, anything contained to the contrary notwithstanding.*

The new law, however, is, as we have seen, full of change upon the subject of qualification, although it affects those only who were not commissioners when it came into operation. Thus, in some cases the amount of qualification is increased; in others, a new class of persons is entitled to the appointment; and, again, in a third, there is a disqualification altogether: only, it may be added, that existing qualifications are preserved. To illustrate the position above laid down, let us mention, first, that the amount of a freeholder's annual receipts is advanced from 40 marks (26*l.* 13*s.* 4*d.*) to 100*l.*; and that a lessee for years, who, if a freeholder, was qualified under the old statutes, provided he did not act within the limits of his own lands, must now have 100*l.* per annum if a freeholder; and 200*l.* per annum, if a mere lessee for years. And the lessee cannot act in the commission where his lands are situate, for the act of Elizabeth is not repealed. Secondly, new persons are enabled to be commissioners, as, copyholders of 100*l.* per annum. Leaseholders for sixty years of 100*l.* per annum, or possessing estates determinable upon a life or lives. Leaseholders for twenty-one years of 200*l.* per annum; ten years being unexpired. Heirs apparent of freeholders or copyholders upon estates amounting to 200*l.* per annum. Agents of corporate bodies or commissioners, as we have above explained, their estates amounting to 300*l.* per annum.

In construing these statutes respecting the qualification of commissioners, it is observable, that a person must have the lands or hereditaments specified, *at the time of his sitting*, that the property must bear a clear annual value, and must accrue to the particular use of the proprietor. Thus, Callis says, if one have not lands at the time of his appointment to be a commis-

* See as to these sections, *post*, immediately in this chapter.

sioner, yet if he come into possession of such at the time of his sitting, the law would be satisfied. And then, again, if the commissioner dispose of his land so acquired, or, indeed, of any land of which he is the proprietor, and leave himself without an annual income of forty marks arising from the hereditaments mentioned in the statute, or if he be evicted of his lands, his qualification will cease (*d*). As if one were tenant for the life of J. S., and then J. S. die, the qualification expires also (*e*). So, also, if a commissioner should bargain and sell his lands to another by deed, and before the enrolment of the deed the bargainee sit as commissioner, the relation of the working of the deed will not screen him from the penalty of sitting unqualified (*f*). So a *disseisee*, during the time of his disseisin, is disqualified (*g*).

Again, the lands in question must be of an annual value, clear of all charges. Mr. Sergeant Callis mentions several hereditaments which are capable of qualifying, as being of yearly value, and some which are not competent for that purpose. In the first class he enumerates messuages, cottages, tofts, crofts, houses, land, meadows, pasture, feedings, moors, marshes, heaths, furze, mills, orchards, gardens, hop-yards, rents, annuities, *prima vestura terræ*, piscaries, tithes, pensions, portions, proxies, parks, and warrens (*h*). In the second class are mentioned franchises and liberties, as waifs, strays, felons' goods, deodands,* fines, amerciaments, profits, grants, fairs, markets, ferries, hundreds, leets, and such like, because they do not bear a certain annual value (*i*). So again, offices and vocations, as physicians, &c., trades, as merchants, &c., give no qualification (*k*). Nor, moreover, do advowsons (being of no value to the possessor, and not being assets in the hands of executors), homages, fealties, escages, heriots, reliefs, *nomine pœnæ*, &c. (*l*). Nevertheless, if the franchises above alluded to be demised for a year, the lessor may be qualified, because they then acquire the annual value which the statute prescribes (*m*).

(*d*) Callis, 245.

(*e*) Ibid.

(*f*) Ibid.

(*g*) Id. 246.

(*h*) Id. 241.

* Abolished by 9 & 10 Vict. c. 62.

(*i*) Callis, 241.

(*k*) Ibid.

(*l*) Id. 242.

(*m*) Id. 241.

There are, however, other circumstances still necessary to ensure the qualification by estate, namely, that the possessor should have the lands *in presenti*, and to his own use. Dry reversions or remainders, therefore, as Mr. Sergeant Callis expresses it, depending upon estates for lives, are insufficient for the purpose (*n*). A man seised of lands in right of his wife was not competent, because he had them not to his own use (*o*). And as before the statute of uses a feoffee to an use was no competent commissioner, neither the *cestui que use* (*p*);—so now neither the trustee (*q*), nor the *cestui que trust* are qualified. For in both these cases the land would be considered in the one instance as holden to another man's use, and in the other, a mere equitable estate would exist. Neither, again, are tenants in common, joint-tenants, as coparceners qualified, although the joint-tenants be seised *per my et per tout* (*r*). But if the annual value of the lands possessed by persons sustaining these last characters be of double the annual value of forty marks, either of them may sit (*s*). And since the statute of Will. 4, a man seised of lands in right of his wife is competent, although he has them not to his own use (*t*).

The learned sergent above referred to speaks also of various persons and corporations who are or are not qualified according to their respective characters and stations in life. Amongst the first classes, or such as are qualified, the following persons are enumerated:—bishops, deans, chancellors, archdeacons, prebends, parsons and vicars seised of lands *in jure ecclesiæ* of the value of forty marks as before mentioned (*u*), a villain having property to the above annual amount, because until his lord enter, he has it in his own use (*x*), the warden of the Fleet, by virtue of the lands belonging to his office (*y*),

(*n*) Callis, 241.

(*o*) Id. 242.

(*p*) Ibid.

(*q*) 7 Com. Dig. 339, tit. "Sewers."

(*r*) Callis, 242, 243.

(*s*) Id. 243.

(*t*) See *supra*.

(*u*) Callis, 243.

(*x*) Ibid.

(*y*) Id. 244. But this office is now abolished.

a woman (*z*), an infant above the age of fourteen, but under twenty-one (*a*).

The following persons were also declared by the writer to be incompetent: a dean and chapter, a mayor and commonalty, a master of a college, and the fellows, although seised of lands and tenements of the annual value of 100*l.* (*b*), an alien, because his seisin is that of the king; although he becomes capable of taking lands, and so of being qualified, if made a denizen (*c*). But the statute of 3 & 4 Will. 4, enables the agents of corporations duly appointed under it to act as commissioners, so that the above disqualification becomes much narrowed. Quakers also were disqualified, not as Quakers, but because they would not take the necessary oaths. We shall see presently that this difficulty is at an end.

Yet there are now virtual disqualifications under the enactment of Will. 4, above mentioned, of persons who were expressly qualified by the statute of Hen. 8. As the residents and freemen of any city, borough, or town corporate, having immoveable substance of the clear yearly value of 100*l.*, and utter barristers considered merely in that capacity.

Yet, although the new classes of commissioners may in process of time gain ground,* the freemen having moveable substance, and the barristers are not excluded if they were in the commission of sewers before the statute of William. Therefore we must give the comments of the learned sergeant (Callis) upon these exceptions in the statute 25 Hen. 8. And, first, he declares his opinion, that the party must have been actually admitted to his freedom, and that the residing contemplated by the statute, was not merely general, as being commorant within the walls, though not within the precinct and liberty of the borough; for that inasmuch as the words are resiant, and free of the city, the enactment required the habitation of the commissioner to be in the place of his freedom (*d*).

(*z*) Callis, 250.

(*b*) Id. 243.

(*a*) Id. 253.

(*c*) Ibid.

* The government has already narrowed the number of commissioners in several of the metropolitan districts.

(*d*) Callis, 239.

With respect to the meaning of the expression "moveable substance," it is said to signify personal estate, as horses, oxen, &c., plate, jewels, ready money, &c., a hive of bees, a villain for gears, a captive taken in the wars (in old times) (*e*). The following chattels are said not to be included within that term, so as to confer a qualification: birds and beasts of parks and warrens, doves in dove-houses, money due upon statutes, judgments, recognizances, bonds, bills or contracts. For although these latter be inventoried in the ecclesiastical courts, yet they are not assets in the hands of the executor, until he have received their value (*f*). Neither will the goods of the church qualify the parson, vicar, or curate, nor the goods of a corporation the mayor and aldermen, &c., because the stock in these cases is not attached to their particular persons (*g*). Nor can a lessee be qualified, because there must, in fact, be a property in the goods, and not a mere use or occupation (*h*). And, moreover, with regard to the place in which this personal estate is enjoyed, it is sufficient if it be in any place within the realm, for it is designated by the statute, *moveable substance* (*i*).

The word *clear*, it is observable, relates to the value, and not to the title of the goods; and, consequently, Mr. Sergeant Callis says, that although got by tort and wrong, goods to the amount of 100*l.* would be a clear valuable substance within the law (*k*). And an executor or administrator is not qualified by reason of the possession of such goods, because they are not his own (*l*). With respect to the second exception, the utter barrister, it seems, that he has only to take the oath prescribed by the statute, in order to become competent, for he is not required to possess either lands or goods, or any other qualification than his profession (*m*).

And, lastly, it appears, according to the words of Callis, that a lease for years is no enablement at all, but a disablement (*n*), except in the cases particularly provided for by the statute of Will. 4 (*o*), because a lessee could not have sat as a commissioner

(*e*) Callis, 239, 240.

(*f*) Ibid.

(*g*) Ibid.

(*h*) Ibid.

(*i*) Ibid.

(*k*) Ibid.

(*l*) Ibid.

(*m*) Id. 246.

(*n*) Id. 245.

(*o*) *Ante*, pp. 20, 21.

before the statute of Elizabeth, unless he possessed forty marks annually, besides his lease; and that act imposed upon him the necessity of a further annual income arising out of lands (*p*). The act has been already laid before the reader, and it cannot but be suggested, that its provisions in this respect are not very clear. It seems to have been the object of the legislature, to raise the qualification of lessees for years (which Mr. Sergeant Callis seems to think remarkable, but upon which he offers no comment) (*q*), and further, to prohibit their sitting upon commissions within any precinct where they had lands chargeable. And thus it is said in the digest of Lord Ch. B. Comyns, that "By the stat. 13 Eliz. c. 9, no farmer for years, of lands within the limits of the commission, shall intermeddle in the execution of the commission, unless he have 40*l.* per annum freehold, and then only as to such lands which he holds not as farmer" (*r*). The proviso, however, of the 7th section is not noticed in the digest. And notwithstanding the admission of certain lessees for years to the qualification under 3 & 4 Will. 4, c. 22, the act of Eliz. is not repealed as to their inability to act where their lands are situate.

Taking both the sections of the 13 Eliz. c. 9, together, it seems, in the first place, sufficiently clear, that the lessee for years should not sit as long as he continues a farmer of lands within the same precinct where the commission is carried on; but it is then said, "not having estates of freehold, &c., of the yearly value of 40*l.*;" and then, again, the prohibition is declared to be in force during the time of his continuing a farmer, "and shall not have estate of freehold as is aforesaid;" so that a person having that estate, might, nevertheless, sit in respect of his own lands. This circumstance shows the utility of the proviso, already mentioned, which must, it is suggested, be read with the omission of the word "not" in the beginning, and then the sense of the legislature becomes apparent (although the whole might have been contained in one section), namely, that if possessed of forty pounds per annum in freehold, the lessee should be competent to sit within the

(*p*) See Callis, 245.

(*q*) *Id.* 244, 246.

(*r*) See 7 Com. Dig. 339, tit. "Sewers."

precinct of the commission, provided that he should not interfere in respect of his own lands and tenements.

There is one other circumstance relating to the qualification Oath. of these commissioners, and that is, that each one (unless he be a Quaker) who is qualified by estate, or was qualified in any other way before the statute of Will. 4, must take an oath concerning the faithful discharge of his duty. Under a drainage act certain lords of manors, or their agents, were to be commissioners. A declaration was to be subscribed, which was done by the agents, but not by the lords. The agents acted as commissioners, and were not superseded, except by the actual presence of the lords. The agents were appointed by the lords privately, *i. e.*, not at a public meeting. It was held—1. That there was no need for the lords to have subscribed. 2. That a public meeting for the appointment of their agents was not necessary (*s*). And those who are qualified by estate must verify their qualification under the statute of William. This must be done by the commissioner before he takes upon himself the execution of the commission, and it must be made before the Lord Chancellor, or such as may take the same by virtue of the writ of *dedimus potestatem*, or before the justices of the peace at the quarter sessions (*t*). The form of the oath is given in the note.

There appears to have been some difficulty in obtaining the sanction of this oath on the part of many commissioners, and, consequently, for the remedy of this, an act was passed two years afterwards, to compel the taking of such oaths. By

(*s*) *Ostler v. Cooke*, 18 L. J., Q. B. 185; affirmed in error, *Id.* 831; 22 L. J., Q. B. 71.

(*t*) 23 Hen. 8, c. 5, s. 5. Ye shall swear, that you to your cunning, wit, and power, shall freely and indifferently execute the authority to you given by this commission of sewers, without any favour, affection, corruption, dread or malice, to be borne to any manner of person or persons; and as the case shall require, ye shall consent and endeavour yourself for your part to the best of your knowledge and power, to the making of such wholesome, just, equal and indifferent laws and ordinances as shall be made and devised by the most discreet and indifferent number of your fellows being in commission with you, for the due redress, reformation, and amendment, of all and every such things as are contained and specified in the said commission; and the same laws and ordinances to your cunning, wit and power, cause to be put in due execution, without favour, need, dread, malice or affection, as God help you, and all saints.

Form of the oath.

25 Hen. 8, c. 10, s. 2, it is enacted, that, because divers persons, heretofore assigned to be commissioners, have refused to be sworn according to the said former act, whereby divers commissions heretofore made, remain hitherto without effectual execution; if any person assigned to be a commissioner, and being required by the authority of the king's writ or otherwise, to receive or accept the oath comprised in the former act, shall, whether the refusal and contempt happen in the chancery, or be returned into chancery with the said writ, lose and forfeit for the same contempt, five marks, and so on from time to time for every such contempt as shall be done and returned into the chancery, unless that he, in the same chancery, do show and allege in the said term wherein such return shall be made against him, sufficient and reasonable matter and cause to be allowed by the Lord Chancellor for his excuse and discharge in that behalf.

The same statute which compelled the taking of oaths under the above penalty, created a provision to relieve parties from acting as commissioners out of the county wherein they preside. The first section, after extending the act to the town and marches of Calais, goes on to say, that no person shall be compelled to be sworn or otherwise bound to sit or travel in execution of any commission of sewers within the realm, unless that he be dwelling within the county whereof he is or shall be assigned to be commissioner (*u*).

Further, the commissioner must take an oath of qualification as to his estate, unless he be a Quaker, in which case an affirmation will suffice (*x*). The form of this oath or affirmation is set out below.*

(*u*) 25 Hen. 8, c. 25, s. 1.

(*x*) 3 & 4 Will. 4, c. 22, ss. 2, 3.

* "I do swear, [*or, being one of the people called Quakers, do solemnly affirm,*] That I truly and *bonâ fide* am in my own right [*or in the right of my wife*] in the actual possession and enjoyment of [*or in the receipt for life, or for a larger estate,* of the rents and profits issuing out of] lands, tenements or hereditaments, situate in the county of _____ of freehold or copyhold tenure, *or* held for a term of not less than sixty years absolute, *or* determinable with a life or lives, of the clear yearly value of one hundred pounds above reprises; *or* held for the unexpired term of _____ years, originally granted for _____ years, of the clear yearly value of two hundred pounds above reprises; [*or* am heir apparent of _____, who, to

A few words must be added concerning the forfeiture for acting without qualification, which will end this part of the subject. And it is worthy of remark here, that if a party sit as commissioner without being duly qualified, his act and ordinances are not vacated by the offence, but the only result is the infliction of the penalty. And the statute of Elizabeth expressly declares, that the commission should be void, as having respect only to every such person or persons, that is, persons acting under certain circumstances whilst farmers of lands chargeable, as we have before mentioned (y).

The act of William is likewise to the same effect (z). For after ordaining as a penalty for not qualifying that the defaulter shall forfeit 100*l.* to any one who will sue for the same,* the clause expressly saves the proceedings done under the commission by the unqualified person.

Nevertheless, by 3 & 4 Will. 4, c. 22, s. 5, any mayor, bailiff, or other officer appointed or authorized to act as a commissioner under any commission of sewers by virtue of his office, shall and may, so long as he shall hold such office, act as a commissioner without qualification, or taking any oath or affirmation, or being liable to any forfeiture as above is mentioned. Provided that such mayor, &c., shall, before he acts, deliver a certificate, under the hand of the town clerk or other legal officer of the corporation in respect of which such mayor, &c., shall or may act, to the clerk of the commission, certifying that he is such mayor, &c.

It has been observed, that no prior conviction is requisite in order to proceed for a double penalty in case of two sittings

the best of my knowledge, is seised of freehold or copyhold lands, tenements or hereditaments, situate in the county of _____, of the clear yearly value of two hundred pounds above reprises ;] [or am agent of _____, who [or which] to the best of my knowledge, is seised or possessed in his or their own right] [or in the right of his wife] of freehold or copyhold lands, tenements or hereditaments situate in the county of _____, of the clear yearly value of three hundred pounds above reprises.

"So help me GOD."

[Or being a Quaker, omit the words, "So help me God."]

(y) See Callis, 254, &c.

(z) 3 & 4 Will. 4, c. 22, s. 4.

* The mere fact of having acted as commissioner shall be sufficient evidence for the prosecutor of the action for the penalty. (Sect. 4, *supra*).

without qualification. And the reason assigned is, because there are not here any steps or gradations to double or increase the penalty (*a*).

It has been further said, that although the statute of Henry 8 gives the possessor a power to sue by bill, yet that the competency to do so was taken away by 18 Eliz. c. 5, and that he could sue by information or original action only since that statute of Eliz., but the statute of Will. 4 plainly restores the proceeding by bill (*b*).

The King's Courts are the four ordinary Courts at Westminster; and, therefore, it seems, that an unqualified commissioner cannot be sued in any inferior Court (*c*). And, lastly, it seems to be the better and more received opinion, that the commissioners thus situated, and already menaced with a penalty given by statute, cannot be punished by indictment, although there is a case upon a penal act, in which Twisden, J., contrary to the opinion of Kelyng, C. J., thought differently, but Twisden, J., afterwards came over to the opinion of Kelyng, C. J. (*d*).

A penalty of 50*l.*, to be recovered, with costs, by an action of debt, attaches upon persons acting as commissioners contrary to these provisions. Still, the acts of the disabled commissioners are to be valid if done prior to the recovery of the penalty.

Allowance
to commis-
sioners.

Certain allowances to commissioners of sewers are prescribed by the statute of Hen. 8. It is enacted, that each shall have four shillings per day during every day that they shall take pains in the execution of the commission of sewers, and one clerk by them to be assigned two shillings per day, of the rates, taxes, lots, and wains, that shall be assessed or lost by authority of the said commission, and to be levied and paid by their discretions. The commissioners, or six of them, are, moreover, empowered to limit and assign of the same rates, &c., by their

(*a*) Callis, 246, in the note.

(*b*) Id. 247, in the note.

(*c*) Ibid.

(*d*) Id. 249, in the note. I Mod. 34. Crofton's Case.

discretions, such reasonable sums of money to the said clerk, for writing of books and process concerning the premises, and to the collectors, expeditors, and such other as shall take pains in the due execution of the said commission, as by the discretions of the said commissioners, or six of them, shall be thought reasonable (*e*).

Formerly, the statutes of sewers had temporary continuance from time to time, and they were subsequently made perpetual.

Concerning
the continu-
ance of these
commissions.

It has been observed, that the expiration of the laws, and of the commission which gives birth to them, is not co-extensive. We have above quoted part of the 17th section of 23 Hen. 8, c. 5, to the effect that the laws and the commission should expire at one and the same time, which law is now altered. The rest of the section contains an exception to this expiration of the laws, namely, "except the said laws and ordinances be made and engrossed in parchment, and certified under the seals of the said commissioners into the King's Court of Chancery, and then the king's royal assent be had to the same." This provision, however, is itself repealed by 13 Eliz. c. 9, as we have seen; and it would not have been introduced here, but that it is much referred to in the case which we are about to cite. To proceed concerning the laws: it being found impolitic that the laws made by persons in office should determine with their commissions, the statute of Elizabeth directed, that the orders of commissioners of sewers should continue in force for one year next ensuing the expiration of their commissions at the end of ten years, such orders being written in parchment, indented, and sealed; without a certificate, or the assent royal (*f*). And notwithstanding the determination by *supersedeas*, the old laws were to stand in force until altered by the new commissioners, as we have above mentioned. The second section proceeded to enact, that the justices of peace in the counties where the same laws, &c., are to be executed, within their several commissions and limits, or six of them, whereof two to be of the quorum, shall have power and authority for one year next after the expiration of every such commission, to

(*e*) 23 Hen. 8, c. 5, s. 13.

(*f*) Chap. 9, s. 2.

execute the same laws, &c., as fully as the former commissioners would have been able to execute them, had their commission remained in force. Nevertheless, by section 3, if any new commission of sewers be made within the said year, then immediately and from and after such commission newly made and published, the power of the said justices of the peace, and every of them, in anywise concerning the execution of any such laws, &c., shall utterly cease.

The obvious construction of the above statute of Elizabeth, regarding the validity of the laws after the determination of the commission, would be, that they should remain in force one year subsequently, but no longer; and it was so decided in a case where a mandamus had been issued to certain commissioners in Somersetshire, commanding them to make a certain rate therein mentioned.

The writ recited an order made by the former commissioners of sewers for the county, by which they had decreed, that a sea wall should be refounded, and the expense attending the construction should be paid by those who were previously under an obligation to repair it *ratione tenuræ*. It was further recited, that the wall had been partly rebuilt, and that a part of the money had been raised and expended upon the repair; and further, that a mandamus had issued to the former commissioners, commanding them to make a rate; and that certain proceedings had before them concerning the making of the rate, were subsequently quashed for illegality by the Court of King's Bench. The present writ then went on to state, that the *new* commissioners had been required to make a rate on the level, for the reimbursement of the complainants, who had expended their money; but that they had refused so to do, and the new commissioners were now commanded to make such a rate for repaying the money as aforesaid. The commissioners newly appointed made a special return to this writ. They stated, they had been appointed on the 15th April, 1806; and that the former commission had expired on the 13th of April, 1805 (so that more than a year had elapsed between the death of the old, and the creation of the new commission). The commissioners further alleged, that there had been no proper pre-

✻

sentment by a jury from the body of the county of Somerset (*g*). But when the case came on for argument, the Court intimated great doubt whether the new commissioners could, under any circumstances, carry into operation the old decree, because the provisions of the 13 Eliz. limited the operation of the ordinances of commissioners to ten years, and to one year after the expiration of the commission. It was contended for the prosecution, that the ascertainment of the right or obligation on the level, together with the amount of the sum to be expended on the repair, were the essential parts of the decree; and that these had been executed, and consequently that the reimbursement by a rate on the level was merely a legal result. It was further urged, that the *particular decrees* of commissioners, of which this was one, might be available by the common law, and need not necessarily derive their force from the statutory provisions, and therefore that the expiration of the commission did not affect the decree in question. But the Court said, that no authority could be found to warrant the distinction contended for between decrees and other laws. The acts of Parliament meant to express the same things by the different words used; the laws, acts, decrees, and ordinances, mentioned in the act of Hën. 8 must mean the same thing as laws, ordinances and constitutions, mentioned in the act of Queen Elizabeth; and nothing is to be found in the acts of Parliament to restrain the generality of the expression. With regard to the apprehension of danger by those persons who had acted under the decree of the commissioners, during the existence of the commission, or whilst the decrees continued in force, it was clear that they were in the situation of persons who had acted under the authority of the law whilst it was in force, and which had since expired; but which was of force to protect them during the time they had acted, and required its protection. So much, therefore, of the decree as had been acted upon, and carried into execution, during the time of the late commissioners, was effectual, and done under a competent authority; but that part of it which was left unfinished, could not be enforced on the foot of that order or decree, because they had ceased to have any authority. An application to the new commissioners become necessary, in order to re-enact it. The

(*g*) 7 East, 72.

return to the mandamus was accordingly held good, and allowed (*h*).

Formerly this matter concerning the demise of the crown was otherwise. As where the defendant justified in trespass the taking, under the authority of a commission of sewers granted by the late King James, for a tax assessed according to that authority ; here, a demurrer, alleging for cause that it did not appear whether the tax in question was made before or after the demise of the crown, was allowed (*i*).

However, by 24 & 25 Vict. c. 133, s. 14, a commission of sewers once issued shall be deemed to continue until such time as it may be superseded by her Majesty, who may from time to time fill up any vacancies under her sign manual.

Again, orders of commissioners of sewers are now no longer limited to one year after the expiration of the commission, but they are made indefeasible until set aside by subsequent courts of sewers.

The 7th section of stat. 3 & 4 Will. 4, c. 22, provides for this. It is by that clause enacted, that all laws, acts, decrees, constitutions and ordinances made or to be made by any court of sewers, and duly registered in the rolls or books of such court by the clerk to the commission, shall continue in full force and effect, notwithstanding the expiration, repeal or other determination of the commission under which such laws, acts, decrees, constitutions and ordinances shall have been respectively made. A presentment confirmed by the new commission is binding, although made for many years before under the old jurisdiction (*k*). And, again, notwithstanding the same respectively shall not have been ingrossed or written in parchment, and under the seals of the commissioners or any six of them, and notwithstanding the one part thereof shall not remain with the clerk to the commission, and the other part in such place as the said

(*h*) *The King v. The Commissioners of Sewers for the County of Somerset*, 9 East, 109.

(*i*) *Thirby v. Loam and Sands*, Lat. 170 ; Bendl. 199.

(*k*) *Taylor v. Loft*, 22 L. J., Ex. 231 ; 8 L. J., Ex. 269.

commissioners or six of them shall order or appoint, and notwithstanding the same shall not be certified into the King's Court of Chancery, and the king's royal assent had thereto respectively, until the same laws, acts, decrees, constitutions and ordinances shall be altered, repealed or made void by any subsequent court or courts of sewers in those parts or limits where the same laws, decrees and ordinances were or shall be made and ordained, or by any six of them.

The discharge of commissioners, independently of the expiration of the commission, is given by the stat. of Hen. 8 thus : Nevertheless, after any commission made and delivered out of the Court of Chancery, the king may always, at his pleasure, by his writ of *supersedeas*, out of the Court of Chancery, discharge both the commission and the commissioners, and this shall determine the power of the commissioners at once (*l*). However, we have seen, that the laws and decrees made at the time of such *supersedeas* shall not be thereby abrogated ; but shall continue in force until altered, repealed, or made void by future commissioners (*m*). The old commission may, consequently, be terminated either by a *supersedeas*, or the issuing of a new commission.

The statute of Elizabeth, moreover, expressly enacts, with respect to the certificate and return of the commission so much alluded to in a former page, that the said commissioners shall not be compelled to make any certificate or return of the said commissions, or of any of their ordinances, laws or doings, by the authority of any of the said commissions, nor shall have any fine, pain or amercement, set upon them, nor shall be any ways molested in body, lands, or goods, for that cause (*n*). No certificate
or return of
commission.

Nevertheless, the commissioners must be careful to act within the scope of their authority ; for, to use the words of Lord Coke, they have not such an absolute authority, but that their proceedings are bound by law (*o*). And upon one occasion, in old

(*l*) 23 Hen. 8, c. 5, s. 16. This power has been exercised by the discharge of nearly 800 commissioners in the metropolitan districts.

(*m*) 13 Eliz. c. 9, s. 1.

(*n*) Id. s. 5.

(*o*) 4 Inst. 276.

times, where commissioners had been exceeding their powers, the Court not only fined some of them, but an indictment of *præmunire* was drawn upon the statute of 27 Edw. 3, c. 1, against one, who did not appear, for his illegal conduct as a commissioner (*p*).

Some time after this, where the executors of a person assessed brought a *certiorari*, and removed the proceedings before the commissioners in the King's Bench, it was doubted by Mallet, J., whether they were lawfully removed, because their proceedings were in English, whereas all proceedings before the Court of King's Bench were in Latin; and he thought also that no writ of error lay to correct them. But Sir Robert Heath, J., was of a contrary opinion, observing, that in trespass or *replevin*, their proceedings were, doubtless, removable there; and he thought that a *certiorari* might well be had. But Brampston, C. J., at first doubted, and said, that he had asked of the clerks in Court, whether, supposing the Court to confirm the decree, they ought to remand it, or to execute it by estreat into the Exchequer; and as they could not resolve him, he hesitated upon the *certiorari* then before the Court, although he thought the proceedings lawfully removed, and that a *certiorari* lay; yet he added, that he should be very tender of granting such a writ. However, being then informed that the case was before the Court by consent, and that all parties had bound themselves by a recognizance to abide the judgment, he said, that *consensus tollit errorem*, and that they would not stick upon the *certiorari* (*q*).

But, upon another occasion, certain commissioners of sewers declined to obey writs of *certiorari*, relying as they did upon the above section in the statute of Elizabeth, concerning the non-return of the certificate and commission. A *certiorari* had been delivered to them in the first instance, which, after some reluctance, they allowed; but proceeded again, notwithstanding, upon the old matter, and fined persons who disobeyed their orders. Upon this a second *certiorari* was delivered to them; but they persisted, and inflicted both fine and imprisonment upon the

(*p*) *Hetley v. Sir John Boyer*, Cro. Jac. 336.

(*q*) *Commins v. Massam*, Mar. 196, pl. 141.

parties who still declined to conform to these decrees. An attachment was then awarded against them for a contempt of Court, and they were questioned concerning these misdemeanors. They said, they had acted under the advice of counsel, and that it was doubtful whether they were not justified in their course of conduct, by virtue of the above exemption in the statute of Elizabeth. But the Court were decidedly against their plea of exemption, and the judges delivered their opinions *seriatim*, and at length, in favour of a fine, for conduct which they deemed a great offence and contempt; and a fine was set of forty marks each for disobedience to the first writ of *certiorari*, and twenty marks apiece for neglect of the second; and Mr. Justice Twisden observed, that had it not been for the advice of counsel, he should not have stuck to fine them 100*l.* apiece (*r*). Lord C. J. Kelyng also added, that the clause did not refer to the Court of King's Bench, for it spoke of returning the commissions; now the commissions were never returnable into the King's Bench, and the Court of King's Bench could never be ousted of its jurisdiction without special words (*s*).

This case has been introduced here by reason of its near connexion with the section above set out, but the reader will find the law on the subject of these writs of *certiorari*, as they affect commissioners of sewers, discussed at length in the fourth chapter of this Treatise.

Commissioners of sewers may be created by act of Parliament, independently of any general commission. As in the case of the Bristol Dock Company, who were not only authorized to make sewers, but were likewise intrusted with very large powers towards the execution of the duties imposed upon them (*t*).

And it has been thought proper, in modern acts of Parliament, to insert saving clauses preserving entire the rights

(*r*) Smith's case, 1 Ventr. 66; Rex v. Smith and Others, Commissioners of Sewers, 1 Lev. 288; 2 Keb. 635, nom. Rex v. Lluellin, Smyth, &c., Commissioners of Sewers; Tho. Raym. 186; 1 Mod. 44; S. C. recognized by Holt, C. J., 1 Lord Raym. 469. See also 1 Salk. 145.

(*s*) 1 Ventr. 68.

(*t*) 6 B. & C. 181.

W.

E

of several commissions of sewers. Thus, by 3 & 4 Will. 4, c. 22, s. 61, no local or private act of sewers, concerning any county, city, town, district, lands, or limits, or any commission of sewers in the county of Middlesex, within ten miles of the Royal Exchange, is to be affected by the act, except such parts of the said county as may lie within any commission of sewers in the county of Essex; nor shall it interfere with any navigable river, canal, port or harbour, under the management or power of any commissioners, trustees, or proprietors, by virtue of any local or private act of Parliament, nor with Romney Marsh, in Kent, nor with the Bedford Level.

The 62nd section saves the rights of the city of London and the liberties thereof in respect of sewers, drains, vaults, and bridges, and all acts of Parliament relating thereto. Also the Metropolitan Police Act (*u*), and the Metropolis Improvement Acts (*x*), except as to arching over drains in the street (*y*). The Public Health Act (*z*); the Smithfield Improvement Act (*a*); the Nuisances Removal Act (*b*); and the Thames Embankment Acts (*c*), afford other instances.

By 21 & 22 Vict. c. 98, s. 72, any corporation, &c., authorized under an act of Parliament to navigate, may alter sewers, providing others at their own expense.

The 4 & 5 Vict. c. 45, s. 15, after enumerating the above acts of Parliament and commissions of sewers, mentioned in 3 & 4 Will. 4, c. 22, s. 61, adds to the saving clause all lands, banks, waters, watercourses, sluices, bridges, drains, or works belonging to the commissioners of the North Level and Portsand, in the counties of Cambridge, Northampton and Lincoln, or of the

(*u*) 2 & 3 Vict. c. 47, s. 60.

(*x*) 3 & 4 Vict. c. 87, s. 74; 4 & 5 Vict. c. 12, s. 74.

(*y*) 3 & 4 Vict. c. 87, ss. 18, 19; 4 & 5 Vict. c. 12, ss. 17, 18.

(*z*) 11 & 12 Vict. c. 63, s. 145, repealed by 21 & 22 Vict. c. 98, s. 68, which substitutes other provisions.

(*a*) 14 & 15 Vict. c. 60, s. 4.

(*b*) 18 & 19 Vict. c. 121, s. 43.

(*c*) 25 & 26 Vict. c. 93, s. 68; and by 25 & 26 Vict. c. 93, s. 67, if the sewerage be interfered with, the board must provide a substitute till the low level sewer becomes available. 26 & 27 Vict. c. 45, s. 28. See s. 15.

commissioners of the Nene Outfall, in the counties of Cambridge, Lincoln, and Norfolk, or of their committees respectively.

Then the 16th section saves the rights of the city of London. The 17th section saves the commissioners of sewers for Westminster.

The 18th section more especially and fully saves the rights of the Bedford Level corporation than the previous clause (the 15th).

And, lastly, the 13th section enacts, that nothing in the act shall prevent any court of sewers from executing the powers and provisions of the recited acts (*d*), or the laws of sewers of old time accustomed.

In effect, the 14th section embraces all the savings reserved by the statute of William. It enacts, that all indemnities, immunities, and liabilities given to or imposed upon commissioners of sewers and other persons, by the stat. 3 & 4 Will. 4, c. 22, shall be deemed and construed to extend to all persons acting in the execution of the act.

Commissioners are sometimes elected under Drainage Acts. Where they were to be elected by the proprietors of lands within the parish, it was made a question, and left undecided whether the word "proprietors" meant the owners in fee, or those who had the control over the lands (*e*).

In this case it appears, that the act allowed votes to be given by a note in writing. The instrument produced, being the proxy, contained no directions to vote for any one in particular. It was held, that a stamp was requisite under 55 Geo. 3, c. 184 (*f*).

Moreover, by the Drainage Act, 10 & 11 Vict. c. 38, s. 18, the powers of commissioners of sewers, and commissioners under local acts, as well as the laws of Romney Marsh and of the Bedford Level, are expressly saved.

(*d*) 23 Hen. 8, c. 5; 13 Eliz. c. 9; 3 & 4 Will. 4, c. 22.

(*e*) *R. v. Kelk*, 4 Per. & D. 185.

(*f*) 12 Ad. & El. 559; 4 Per. & D. 185. Had those directions appeared in the instrument, *qu.* as to the stamp. See also *S. C.* another point, 1 Q. B. 660; 1 Gale & D. 127.

The powers of the Eau Brink Drainage Commission were saved in the following manner:—Nothing shall extend, or be construed to extend to invalidate, lessen, or diminish, alter or take away, any of the rights, powers, authorities, and liabilities vested in the commissioners for drainage under the several Eau Brink Acts. A question was made, whether the saving clause would include the tolls, to part of the net amount of which the commissioners of drainage had a right when they were collected, or whether it was limited to the mere proximate rights, powers, &c., of the commissioners. And the Court held, that the clause operated in the larger sense, and that the tolls were saved (*g*).

By 11 & 12 Vict. c. 63, s. 43 (the Public Health Act), all sewers under the authority of any commission of sewers appointed by the Crown are excepted out of the jurisdiction of the Local Board of Health.

By 21 & 22 Vict. c. 98, s. 68, the local board shall not use, injure, nor interfere with any sluices, flood-gates, groynes, sea defences, or other works of sewers, nor with any such works made under any local or private act, or irrigation act, nor with Crown lands, without consent from the commissioners, or a Secretary of State, or person entitled to the rights. . . .

Nor shall interfere with any river, canal, &c., so as to affect the navigation, nor with any towing path to interrupt the traffic, where the parties are entitled to navigate such river, &c., or to take tolls.

Nor interfere with watercourses, so as to affect the supply of water to such river, &c.

Nor interfere with any bridges crossing any such river, &c.

Nor execute any works in, through, or under any wharves, quays, docks, &c., where any corporation, &c., is entitled to the exclusive use under an act, or to tolls under an act of Parliament, without the consent of the corporation, &c., under their common seal, or, in other cases, in writing.

The Metropolitan Sewers Act itself was saved out of the Smoke Nuisance Act (*h*). On the other hand, sewers are sometimes extinguished by Parliament (*i*).

(*g*) *Coulton v. Ambler*, 13 Mees. & W. 403.

(*h*) 16 & 17 Vict. c. 128, s. 7.

(*i*) 24 Vict. c. 13, s. 5; 24 & 25 Vict. c. 41, s. 7. The Admiralty.

There are also local acts for improving towns, as the Brighton Act, &c. Commissioners are appointed to defend the town against the encroachments of the sea (*k*). And by 24 & 25 Vict. c. 133, s. 54, the general rights of persons acting under local or private acts, or canal acts, or canals, or waterworks, or wharfingers' acts, are saved, except by consent. By sect. 55, there is also a saving as to rivers, except with the consent of conservators. There is also power for canal, dock or harbour commissioners to alter sewers, upon condition of substituting others (*l*). All exemptions under local acts are preserved by sect. 57; and the powers given by sect. 60 are to be in addition to, and not in derogation of, the general powers of commissioners of sewers.

The alteration of boundaries is provided for by the 62nd section. If the powers of a local act conflict with the general act 18 & 19 Vict. c. 120, the Metropolitan Board has the precedent right, and the powers of the commissioners under the other act are, at least, suspended (*m*). Boundary line.

(*k*) See *Mills v. Funnell*, 2 B. & C. 899; 4 D. & R. 561, *ante*, p. 29.

(*l*) Sect. 56.

(*m*) *Daw v. Metropolitan Board*, 31 L. J., C. P. 223.

CHAPTER II.

Of the Duties and Powers of Commissioners of Sewers.

HAVING spoken of the origin of these commissions of sewers, of the statutes from which they derive their authority, of the qualifications of the commissioners, the duration of the commissions, and of other similar matters, we proceed to lay before the reader more particularly the duties and powers of these officers. These trusts, which are reposed in commissioners, may be classed generally under two heads, namely, the maintenance of proper defences, and the reformation of annoyances.

They are chiefly comprehended under the commission which we are about to insert as to the basis upon which the officers of sewers are authorized to act; and various incidental powers have been created, in order to ensure the due and effectual execution of the commission.

The course proposed for the purpose of exhibiting this important subject in its proper light will be, first, to set out with the commission itself, and then to sum up its different divisions; after which, the extent of the commissioners' authority in promoting the defences above mentioned, and in abolishing annoyances, will be discussed at length. Having done this, we shall endeavour, in a subsequent chapter, to point out the mode of enforcing obedience to the commission; and in the progress of that attempt, some account of the jurisdiction of the sewers will necessarily be included.

The statute 6 Hen. 6, c. 5, the first which prescribed the duties of commissioners of sewers in a regular form, although not repealed, is yet so far superseded by the subsequent acts of Hen. 8, which incorporate all the chief provisions of the former

statute as to render it unnecessary that we should do more than mention it.

The third section of 23 Hen. 8, c. 5, having assigned certain commissioners to be justices, for the purpose of executing the commission, goes on to ordain, that they shall survey the said walls, streams, ditches, banks, gutters, sewers, gotes, calcies, bridges, trenches, mills, mill-dams, flood-gates, ponds, locks, hebbing-wears and other impediments, lets and annoyances aforesaid, and the same cause to be made, corrected, repaired, amended, put down or reformed, as the case shall require, after your wisdoms and discretions. AND therein as well to ordain and do, after the form, tenor and effect, and singular the statutes and ordinances made before the 1st day of March, in the three-and-twentieth year of our reign, touching the premises, or any of them; as also, to inquire, by the oaths of the honest and lawful men of the said shire or shires, place or places, where such default or annoyances be, as well within the liberties as without (by whom the truth may the rather be known), through whose default the said hurts and damages have happened, and who hath or holdeth any lands or tenements, or common of pasture, or profit of fishing, or hath or may have any hurt, loss or disadvantage, by any manner of means in the said places, as well near to the said dangers, lets and impediments as inhabiting or dwelling thereabouts, by the said walls, ditches, banks, gutters, gotes, sewers, trenches and other the said impediments and annoyances;

Inquiry by whose default the annoyances came.

AND all those persons, and every of them, to tax, assess, charge, distrain, and punish, as well within the metes, limits, and bounds of old times accustomed, or otherwise, or elsewhere within our realm of England, after the quantity of their lands, tenements, and rents, by the number of acres and perches, after the rate of every person's portion, tenure, or profit, or after the quantity of their common of pasture, or profit of fishing, or other commodities there, by such ways and means, and in such manner and form as to you, or six of you, whereof the said A., B., and C. to be three, shall seem most convenient to be ordained and done for redress and reformation to be had in the premises;

Assessing the persons to be contributory to the charge.

Repair.

AND ALSO, to reform, repair, and amend the said walls, ditches, banks, gutters, sewers, gotes, calcies, bridges, streams, and other the premises, in all places needful; and the same, as often, and where need shall be, to make new, and to cleanse and purge the trenches, sewers, and ditches, in all places necessary;

Putting down annoyances.

AND FURTHER, to reform, amend, prostrate and overthrow all such mills, streams, ponds, locks, fish-garths, hebbing-wears, and other impediments and annoyances aforesaid, as shall be found by inquisition, or by your surveying and discretions, to be excessive or hurtful;

Appointing of bailiffs, collectors, surveyors, and other inferior officers.

AND ALSO, to depute and assign diligent, faithful, and true keepers, bailiffs, surveyors, collectors, expeditors, and other ministers and officers, for the safety, conservation, reparation, reformation, and making of the premises, and every of them, and to hear the account of the collectors, and other ministers of and for the receipt and laying out of the money that shall be levied and paid in, and about the making, reforming, repairing, and amending of the said walls, ditches, banks, gutters, gotes, sewers, calcies, bridges, streams, trenches, mills, ponds, locks, fish-garths, flood-gates, and other impediments and annoyances aforesaid;

Distraint for the arrearages of the money assessed.

AND to distraint for the arrearages of every such collection, tax, and assess, as often as shall be expedient; or otherwise to punish the debtors and detainers of the same, by fines, amer-ciements, pains, or other like means, after your good discretions;

Taking of labourers, workmen and carriages, timber and other necessities.

AND ALSO, to arrest and take as many carts, horses, oxen, beasts, and other instruments necessary, and as many workmen and labourers as for the said works and reparations shall suffice, paying for the same competent wages, salary and stipend, in that behalf; and also take such and as many trees, woods, underwoods, and timber, and other necessities, as for the same works and reparations shall be sufficient, at a reasonable price, by you, and six of you, of the which we will that A., B., and C. shall be three, to be assessed or limited as well within the limits

and bounds aforesaid, as in any other place within the said county or counties near unto the said places ;

AND to make and ordain statutes, ordinances and provisions, from time to time, as the case shall require, for the safeguard, conservation, redress, correction and reformation of the premises, and of any of them, and the parts lying to the same, necessary and behooveful, after the law and customs of Romney Marsh in the county of Kent, or otherwise by any ways or means after your own wisdoms and discretions ;

To make statutes and ordinances.

AND to hear and determine all and singular the premises, as well at our suit as at the suit of any other whatsoever complaining before you, or six of you, whereof A., B., and C. shall be three, after the laws and customs aforesaid, or otherwise, by any other ways or means, after your discretions ; and also to make and direct all writs, precepts, warrants or other commandments, by order of these presents, to all sheriffs, bailiffs, and all other ministers, officers, and other persons, as well within liberties as without, before you, or six of you, whereof the said A., B., and C. to be three, at certain days, times and places to be prefixed, to be returned and received ; and further, to continue the process of the same ; and finally, to do all and every thing and things as shall be requisite for the due execution of the premises, by all ways and means, after your discretions ;

To hear and determine.

Awarding of writs and precepts to sheriffs, bailiffs and others.

AND therefore, we command you, that at certain days and places, when and where ye, or six of you, whereof the said A., B., and C. to be three, shall think expedient, you do survey the said walls, fences, ditches, banks, gutters, gotes, sewers, caleies, ponds, bridges, rivers, streams, watercourses, mills, locks, trenches, fish-garths, flood-gates, and other the lets, impediments, and annoyances aforesaid ; and accomplish, fulfil, hear and determine all and singular the premises, in due form, and to the effect aforesaid, after your good discretions ;

Survey.

To hear and determine.

AND all such as ye shall find negligent, gainsaying or rebelling in the said works, reparations or reformations of the premises, or negligent in the due execution of this our com-

To compel others to obey their orders.

mission, that ye do compel them by distress, fines and amer-ciements, or by other punishments, ways or means, which to you, or six of you, whereof the said A., B., and C. shall be three, shall seem most expedient for the speedy remedy, redress and reformation of the premises, and due execution of the same; and all things as by you shall be made and ordained in this behalf, as well within liberties as without, ye do cause the same truly to be observed, doing therein as to our justice appertaineth, after the laws and statutes of this our realm, and according to your wisdoms and discretions.

Notwithstanding the great length, and (if one might so speak) the verbiage of this section, it is capable of being simplified without difficulty; and it is impossible not to perceive the extensive authorities with which commissioners of sewers are invested by virtue of its enactments. We shall find, however, that notwithstanding these considerable powers, the officers of sewers are restrained by the general laws of the land, as far as they have respect to the liberty of the subject, and to the jurisdiction of superior courts; so that although the pages of history occasionally disclose attempts on the part of commissioners to exceed their delegated jurisdiction, speedy interposition and redress have succeeded upon application to another and a higher tribunal.

It becomes our duty to notice other powers which succeeding sections have given to commissioners of sewers. They are empowered, according to the purport and effect of their commissions, to make, constitute and ordain laws, ordinances and decrees, and further, to reform, repeal and amend, and make new the same laws from time to time, as need may require; and they are enjoined to act according to the true meaning of their commission (*a*). Moreover, these laws so ordained by the commissioners, or by six of them, by authority of the commission, shall bind the king's lands, &c., and those of every other person, and their heirs, for such their interest, as they shall fortune to

(*a*) 23 Hen. 8, c. 5, s. 7. And in the act of Queen Mary, touching the sea sands in Glamorganshire, a similar power is given to commissioners therein named. 1 Mar. Sess. 9, c. 11, s. 2.

have in any lands, &c., or other casual profit, advantage or commodity whatsoever, whcreunto the said law may extend, according to the true purport of these laws (*b*).

The statute 24 & 25 Vict. c. 133, s. 16, likewise states the general powers of commissioners.

The powers of commissioners of sewers acting within their jurisdiction shall extend to the following acts :

*Declaration
of powers of
commis-
sioners.*

- (1.) To cleansing, repairing or otherwise maintaining in a due state of efficiency any existing watercourse or outfall for water, or any existing wall or other defence against water, hereinafter referred to under the expression "maintenance of existing works."
- (2.) To deepening, widening, straightening or otherwise improving any existing watercourse or outfall for water, or removing mill-dams, weirs or other obstructions to watercourses or outfalls for water, or raising, widening or otherwise altering any existing wall or other defence against water, hereinafter referred to under the expression of "improvement of existing works."
- (3.) To making any new watercourse or new outfall for water, or erecting any new defence against water, to erecting any machinery or doing any other act not hereinbefore referred to, required for the drainage, necessary supply of water for cattle, warping or irrigation of the area comprised within the limits of their jurisdiction hereinafter referred to under the expression "the construction of new works."

Provided,

- (1.) That no person shall by virtue of this act be compelled to execute at his own expense any works which he would not have been compelled to execute if this act had not passed.
- (2.) That no work shall be deemed to be a new work that is in substitution for an old one, in cases where such old work is so much out of repair or so insufficient as to make it expedient to construct a new work in place thereof.

(*b*) 23 Hen. 8, c. 5, s. 9.

- (3.) That full compensation shall be made for all injury sustained by any person by reason of the exercise by the commissioners of the above powers.
- (4.) That the exercise of the foregoing powers shall be subject to the restrictions hereinafter mentioned.

Restrictions
as to ob-
structions.

By sect. 17, the commissioners shall not be entitled to remove or otherwise interfere with any mill-dam, weir or other like obstruction, whereby the level of the water is raised for any milling or other purpose of profit, so as to injuriously affect the supply of water, otherwise than with the consent of the owner of such mill-dam, weir or other like obstruction, until the following things have been done; that is to say,

- (1.) Their right to do so has been determined in manner hereinafter mentioned.
- (2.) Compensation has been made to all parties entitled for the injury which may be caused by such removal or interference.

Questions as
to right to
remove any
obstructions.

And by sect. 18, for the purpose of determining the right of the commissioners to remove or otherwise interfere with any such dam, weir or other like obstruction, there shall be decided, if the owner consent, by two or more justices assembled in petty sessions, but if he do not consent, by arbitration, the questions following; that is to say,

- (1.) Whether the proposed removal or interference is necessary for the effectual drainage of land within the jurisdiction of the commissioners.
- (2.) Whether the proposed removal or interference will cause any injury to the owner.
- (3.) Whether any injury that may be caused by the removal or interference is or is not of a nature to admit of being fully compensated for by money.

By sect. 19, if the decision be that such removal is not necessary, the commissioners may not act; but if necessary, and yet not capable of being compensated by money, they still may not act; but if it may be so compensated, the commissioners may proceed. Then to ascertain this compensation, the Lands Clauses Consolidation Act is to be employed (c).

(c) 8 & 9 Vict. c. 18.

We will now take a brief review of these duties and powers, before we proceed in detail, premising that the commissioners, throughout the whole of the legislative enactments upon this subject, are commanded to confine themselves within the spirit and tenor of their respective commissions, and the ordinances in force concerning sewers. It seems that the first duty which presents itself to them is the survey of the various defences and annoyances enumerated in the statute of Hen. 8. Commissioners are not only directed in express terms to make this survey, and to hear and determine concerning the same according to their discretion, but they are, moreover, informed, in the opening of the third section of 23 Hen. 8, that they are assigned to be commissioners for that especial purpose. Having made the survey, the next step is to inquire through whose default the annoyances they have observed in their survey have arisen; whether these mischiefs be for want of repairing defences or by reason of improper erections, and also to ascertain the ownership of the various lands in the district where the offences have occurred, together with the names of such as have suffered inconvenience. That being accomplished, an assessment is to take place upon the lands of all those individuals, as well those who have suffered damage, as the others, their neighbours, according to the respective quantities of lands, or other property, possessed by them. This assessment is made in consideration of the repair which the commissioners are directed to perform, and of the expense incurred by suppressing the annoyances complained of. This statute, therefore, combines the two features alluded to by Lord Coke, as we have already mentioned: it not only commands the restoration of useful public works, but prescribes also the destruction of such as may be found injurious. But the power of the commissioners does not end here: they are further enabled to take labourers, workmen and carriages, &c., for the ensuring of these general benefits, and timber also, with other necessities, if required, upon paying to the proprietor a reasonable consideration.

Review of
the com-
mission.

The next power which we notice is a legislative authority; for the commissioners are enabled to make such laws, ordinances, and decrees, as may appear to them to be expedient concerning sewers; and what is more, they have a judicial authority as well,

and are fully empowered to sit in judgment upon their own orders, subject, nevertheless, to the correction of a higher court. Thus they are directed to hear and determine concerning the premises; and they are authorized in furtherance of this, to issue their writs and precepts to sheriffs, bailiffs, and others. And, moreover, all persons who show any negligence in the due execution of the commission, by disobeying the orders of the commissioners, or otherwise, are threatened with distress, fine, and, *in some cases*, with imprisonment. And so again, the commissioners are entrusted with a power of distress against all who do not contribute according to the assessments imposed. Lastly, they may appoint officers to aid in the execution of the commission. Amongst these, bailiffs, surveyors, collectors, and expeditors, are expressly mentioned, and auditors of the accounts are afterwards included in the number of officers who may be appointed.

Having thus given a summary of the provisions which relate to the authority of commissioners of sewers, it is easy to perceive that the subject seems divisible into two parts; first, the general duties of the commissioners; and, secondly, the modes by which they may enforce performance of their orders, in furtherance of the execution of those duties. The first of these heads shall be discussed in the present chapter.

Romney
Marsh.

But we will pause for a moment before we proceed to the main points of this subject, for the purpose of explaining one or two collateral matters which occur in the first instance. In a part of the third section above set forth, it is said, that the laws and customs of the commissioners are to be made after the laws and customs of Romney Marsh, and it might be thence considered, that these officers were bound to follow the ordinances of the Marsh. The laws of Romney Marsh, a tract of land in the county of Kent, containing upwards of twenty thousand acres, were certainly of great authority and use; they were attributed to Sir Henry de Bathe, a Judge in the reign of Henry 3, and Lord Coke observes, that not only those parts of Kent, but all England, receive light and direction from those laws (*d*). It is said, that King Henry 3 granted a charter to Romney Marsh,

(*d*) 4 Inst. 276.

empowering twenty-four men, chosen for that purpose, to make distresses upon all having lands and tenements in the Marsh, in equal proportions, in order to repair the walls and water-gates, and so defend them against the sea (*e*). Nevertheless, in spite of this seeming direction above mentioned, commissioners of sewers in other places are not under an obligation to follow the laws of the Marsh; for Lord Coke, in his report of Keighley's case, takes occasion to observe, that the Court had consideration of this particular clause before us; and it was resolved clearly, says the learned Judge, that the several commissioners of sewers throughout England, are not bound to follow the laws and customs of Romney Marsh; but that where some particular place within their commission had them, they might follow them, for *consuetudo loci est observanda* (*f*). Here the word "may" means must, and it appears from the words of Lord Coke, that the laws of the Marsh must be respected at such places.* Yet, at the same time, according to the opinion of Mr. Sergeant Callis, commissioners are not *restrained* from making laws and ordinances like those of Romney Marsh, in places where there may not have been any such before, the matter being left entirely, like most other things relating to these affairs, to their discretion (*g*). And this brings us just to say a word in explanation of the term "according to your

(*e*) See Toml. Law Dict. tit. "Romney Marsh;" and see also 4 Inst. 277. A special committee of twenty-four jurats were selected out of the commonalty of that jurisdiction for this "conservation of the Marsh, and the sea-banks of Romenale." By this special delegation the jurats had all the powers of the Leet. Laws of Sewers, pp. 1 and 2. See also the same tract, p. 2, as to the various commissions issued, and *post* in this chapter.

(*f*) 10 Rep. 140. The charters, laws, usages and customs of Romney Marsh are expressly saved by 3 & 4 Will. 4, c. 22, s. 61.

* It appears, also, that in these local districts, the consent of the commonalty was necessary previously to the making of ordinances. Thus in the old proceedings under the Romney Marsh commissions, the laws are represented as taking effect at the request of the commonalty of the Marsh (*a*). So the statutes of Pevensy, in Sussex, were, in 3 Hen. 4, made by the consent of the lords of the towns, the bailiff and twelve jurats (otherwise called skawers), and the commons of the said Marsh (*b*). So, again, certain ordinances were made in 2 & 3 Ph. & M. in Marshland of Norfolk, touching Powdyke, by the chief inhabitants of the whole county of Marshland and town of Wiganhale (*c*), and the like again in the 8th of Eliz. and the 5th of James 1, 1607 (*d*).

(*g*) Callis, 202.

(*a*) Laws of Sewers, 12.

(*b*) Id. 13.

(*c*) Ibid.

(*d*) Ibid.

discretion," so often found in the statute of Hen. 8. These expressions are by no means to be understood to confer an unlimited authority; but, to use the language of Lord Coke, they are to be intended and interpreted according to law and justice; for every Judge, or commissioner, ought to have wisdom, so as not to be inefficient, and a conscience, to prevent his being unmerciful. Discretion, too, is to know by law what is right, and therefore the commissioners of sewers ought to pursue their commission, and the oath they take to prosecute it, in the same manner as it is there prescribed (*h*).

Survey.

The first general duty to which we have above alluded, as belonging to commissioners of sewers is, a survey of the places mentioned in the statute, and above enumerated. By reason of this word "survey," it was said by Herne, in his Reading, that a man who is blind cannot be a commissioner of sewers, because he cannot view or survey (*i*). The survey of these officers is directed principally to the defences required, and to the annoyances which ought to be abolished. And it is justly said, that, except by survey, commissioners would be unable to satisfy themselves concerning the impediments to navigation, or the repairs required. For this purpose they are empowered to call in the aid of handicraftsmen, as carpenters, masons, &c., as to the nature of the work requisite to be done, and the estimate of expense occasioned by the alterations proposed (*k*). And it is said, that those things which justices of sessions do by their view, or by survey and discretion, are so binding as that traverses cannot be admitted, because these things are merely the acts of the Court, and of the justices themselves (*l*).

And the Local Board of Health, under the statute which gives them their authority (*m*), may likewise cause maps and surveys to be executed for their use.

The things to be surveyed come naturally in the next place under our consideration; and these deserve a very particular

(*h*) 10 Rep. 140.

(*i*) Callis, 108, cites Herne, 3.

(*k*) See Callis, 107; Laws of Sewers, 8 and 9.

(*l*) Callis, 216; 7 Com. Dig. 350.

(*m*) 11 & 12 Vict. c. 63, s. 42.

attention, as many important questions have been raised at different times with regard to the jurisdictions of these commissioners over certain places.

The first of these things to be surveyed, which the statute ^{I. Walls.} notices, is a wall. But we must remind the reader, as we pass on, that the power of these commissioners extends, not merely to the marshy lands of Lincolnshire, as the act runs, but generally throughout England; and it is further worthy of remark, that the whole realm of England comes within their survey. So that the English seas, being within the realm, are within the reach and extent of this statute, although not within the *management* of the commission (*n*). And so it is of creeks and bays, and arms of the sea (*o*); and likewise of islands, whether they have existed from time immemorial, or be but lately sprung up in the sea, provided they be within the realm as before mentioned (*p*). So also of grounds newly gained from the seas (*q*), but not grounds left or derelict, until these latter be made profitable (*r*). So, again, the sea-shore and the coast, being within the realm, are included within the same jurisdiction, as also are ports and havens (*s*). And in reading the account of the jurisdiction of commissioners over various works, the statute of 3 & 4 Will. 4, c. 22, which much confirms, if it does not enlarge, that jurisdiction, must not be forgotten. The provisions of that statute concerning this matter will be given at length in a future page.

First, of sea-walls, and defences of a similar nature, for the purpose of protecting lands from the rushing in of the sea, or of fresh waters (*t*). There is, herein, in the first place, a distinction between public and private walls, the former only being within the guardianship of the officers of sewers. Because the

(*n*) See Callis on Sewers, 39, 42; 7 Com. Dig. 340, 341.

(*o*) Callis, 56, 61.

(*p*) See Callis, 42, 47; 7 Com. Dig. 340.

(*q*) See Callis, 47, 50, 61, 62; 7 Com. Dig. 341.

(*r*) See Callis, 50, 54, 61, 62; 7 Com. Dig. 341. Nevertheless, a wall or bank may be constructed for the aid or succour of the country on such derelict lands, but not for any cause where the defence extends but to themselves, until they be made profitable. Callis, 62; 7 Com. Dig. 341.

(*s*) See Callis, 54—63; 7 Com. Dig. 340.

(*t*) Callis, 75, as to fresh waters.

laws on this behalf have no concern with any defences which are not maintained for the benefit of the commonwealth, and it cannot be said, that a private wall is one of this description (*u*). Nevertheless, as we shall see by and by, the owners of lands on, or adjoining which these walls exist, are either compellable to repair them by reason of their tenure, or may require that benefit from others, in consequence of some existing considerations respectively between them. Walls, therefore, which have been constructed to resist the tide, such as happen in navigable rivers which have their course to the sea, such again as are to be found upon the great and extensive lands in the low countries, having existed there beyond time of memory as bulwarks against the ravages of the ocean, are within the protection and jurisdiction of the commissioners (*x*). And inasmuch as we shall find that they may, at their discretion, establish new defences, these walls, thus made *de novo*, will also form a part of their survey.

If there be an access of water from the sea, by reason of the new works of commissioners, they need not therefore compensate the owners of the land where the water runs. Nor need they make defences to keep out the increase of the sea or other water; for even a private person, much more commissioners of sewers, may contract works, in order to keep out the sea as a common enemy (*y*).

And, lastly, with regard to private walls, it has been affirmed, that although they be set as fences against ditches, gutters and streams, for the draining and watering of private lands, yet, notwithstanding, they are not within the laws in question, which respect public uses only (*z*).

(*u*) See Callis, 76.

(*x*) See Callis, 75; 7 Com. Dig. 341. See also the statute 3 Jac. 1, c. 14, which extends the power of commissioners with respect to walls of this kind within two miles of London.

(*y*) *R. v. Commissioners of Sewers for Pagham*, 8 B. & C. 355; and see 1 B. & Ad. 874.

(*z*) Callis, 76; 7 Com. Dig. 342. By 16 & 17 Vict. c. 34, s. 37, in charging the duty under schedule (A), in respect of lands, &c., an allowance and deduction should be made for the amount expended by the landlord or owner on an average of twenty-one years preceding, as to the making and repairing of sea walls or other embankments necessary for the preservation or protection of such lands from the encroachment or overflowing of the sea or any tidal river, although the sums expended may not have been charged on such lands by any public rate or assessment.

The next subject mentioned by the statute is streams. This word "streams" is said not to apply to rivers, pools, ponds, &c., because those waters have their own peculiar banks, bounds, and channels; but streams are currents of water flowing independently over the land, and they are placed under the control of the commissioners.

2. Streams and water-courses.

But rivers, although not expressly mentioned, are yet within the survey. A river is defined to be "a running stream pent in on either side with walls and banks" (a); and Mr. Sergeant Callis lays it down broadly, that rivers and their channels, waters, and banks, are all fully within the laws of sewers (b). This must, however, be understood of navigable rivers, or such as are immediately beneficial to navigation, or to the public; for late decisions have recognized these latter streams only as being within the statutes. In one case, indeed, a contrary doctrine appears to have prevailed. It was moved to quash an indictment, taken before commissioners of sewers, for a nuisance occasioned by penning water in a river, so that it overflowed the banks, and did damage, because there was no allegation that the river in question was navigable. But Roll, C. J., overruled the exception, observing that such an allegation was not required, for that if it were a common passage for water, it would be sufficient for the cognizance of the commissioners. But inasmuch as the indictment stated this overflowing of the water to be a nuisance to the highway, the learned Chief Justice directed the indictment to be quashed, because the commissioners could not meddle with nuisances in this way, but with passages by water only (c).

Of rivers.

And, a few years afterwards, on the return of a commission of sewers, it was excepted, that the decree was for the straightening of the public stream, whereby the meadow of A. could not be overflowed as usual, and this being a private damage only for which case would lie, that the decree was faulty. And the Court were of the same opinion, holding, that

(a) Callis, 77.

(b) Id. 79.

(c) R. v. Hide, Sty. 60.

there must not only be a public stream, but a public prejudice also, in order to warrant the interference of the commissioners; but the case was adjourned (*d*).

Upon another occasion, the defendant in trespass justified under commissioners, for the non-payment of a tax assessed upon the plaintiff. It appeared, that the plaintiff was an occupier of lands at Hammersmith, that he was benefited by the repairs which called forth the tax; that there were ancient common sewers in Hammersmith, Chiswick, and Acton, but that there was no passage of boats there, that the water did not ebb nor flow, but that the sewers were dry during some seasons. Nevertheless, in wet seasons, the sewers were necessary for the conducting of land waters into the Thames. It further appeared, however, that no part of those sewers were within two miles of the city of London; and because the statute of James I did no more than subject all streams within *two miles* of London to the jurisdiction of the commissioners of sewers, the Court ordered the *postea* to be given to the plaintiff; for the statute of Hen. 8 related to navigable streams only, and in this case there had not been any navigation (*e*).

The following observations were made by Mr. Justice Buller upon this case, on another occasion: "The statute mentions several things which are not of a public nature, as drains, gutters, ponds, &c., which are private, and on which there can be no navigation, and yet they are expressly subject to the jurisdiction of the commissioners of sewers. The line to be drawn is this: if they be necessary or useful in navigation, the statute does extend to them, otherwise they are not within it. Now in this case they are useful, and that distinguishes it from the case in *Blackstone*; for in that case there was no navigable stream, no passage for boats, the tide did not flow there, and it was dry at some seasons of the year, but in wet seasons it was necessary to conduct the land waters into the Thames, without which, inundations would happen in the parishes. That in truth was a mere drain for the lands, it was of a private nature, and was not stated to be useful to the navi-

(*d*) *Rex v. Vachel*, 3 Keb. 446.

(*e*) *Yeaw v. Holland*, 2 Sir Wm. Bl. 717.

gation of the Thames, and therefore the Court thought that it was not within the statute 23 Hen. 8" (*f*).

By stat. 3 Jac. 1, c. 14, s. 1 (*g*), forasmuch as the walls, ditches, banks, gutters, &c., streams, and watercourses, in and about the city of London, where no passage of boats is used, having their course and fall into the Thames, where it usually ebbs and flows, and is used for free passage of boats to the sea, are already by the commission of sewers appointed to be surveyed, repaired, and amended, when need shall require, and are as needful and meet to be surveyed, &c., as those rivers, streams, and watercourses, where the water usually ebbs and where more usual passage of boats has been, and yet are not under the survey, correction, and amendment of the commission of sewers, nor of the statute 23 Hen. 8, nor of any other statute of sewers, as the same would have been if the hurts, &c., now by daily experience felt and found in those places, had been seen and considered of; * by sect. 2, for reformation whereof, it is enacted, that the walls, &c., streams, and watercourses within the limits of two miles of the city of London, which waters have their course and fall into the Thames, shall be to all intents, &c., as fully subject to the commission of sewers, and to all the statutes made for sewers, and to all penalties, &c., as if they had been included in the above statutes, &c.

However, as we shall see presently, if a sewer communicate with a navigable stream, so as that the maintaining of it may be beneficial to navigation, or to individuals, it is within the commission, although it be not within two miles of London.

Rivers, therefore, which are not navigable, do not, except in the above instances by statute, and when immediately connected with the public welfare, fall within the scope of the commissioners' duties, nor, indeed, do private streamlets, as such; but streams running over a level, or other such public grounds, are expressly within the act of Hen. 8, it being necessary for the

(*f*) 2 T. R. 365.

(*g*) See 4 Inst. 276, where Lord Coke says, that this statute of James was an excellent exposition of 23 Hen. 8; but see 2 T. R. 365.

* That this is a misrecital, see 2 T. R. 365. By Ashhurst, J., and *post*, in this chapter.

well-being of the commonwealth that they should be attended to (*f*).

3. Ditches. Thirdly, the survey is to be over ditches, or dikes; that is to say, such ditches as are for the public convenience—those, for example, in the northern parts of England (*g*).

In widening and repairing drains and ditches, commissioners under different acts of Parliament must be careful not to meddle with each other's drainage. Certain works and drainage were vested by statutes in trustees. But the powers and properties, works, sewers, &c., of certain other commissioners, called "The Black Sluice Commissioners," were expressly saved to them. The trustees before mentioned were further authorized to erect a steam engine, &c., upon any land not belonging to the Black Sluice Commissioners, and to repair their sluices, &c., making compensation for damage. It was held, that the trustees had no power under the act to widen a drain which the Black Sluice Commissioners had the management of in order to make a reservoir, although such widening would improve the drainage, and although there the reservoir was necessary for the working of the steam engine, and although there was no other way of proceeding with the work without cutting into the banks or drains under the control of the Black Sluice Commissioners (*h*).

The 35 Geo. 3, c. 77, empowered certain commissioners to make a new cut or river from the Ouse. A subsequent act provided that the trustees of certain roads therein mentioned might make use of *any public or parish drains* or ditch contiguous to their works for the conveyance of materials in boats, &c.

This new cut was called the Eau Brink Cut, and was used as a public navigable river in lieu of the ancient channel of the Ouse. It appeared also, that unless the Eau Brink could be considered to be a drain or ditch within the meaning of the act,

(*f*) See likewise the stat. 3 & 4 Will. 4, c. 22, *post*.

(*g*) See Callis, 81, 82. Ditches are mentioned by name in 3 Jac. 1, c. 14.

(*h*) Smith v. Bell, 10 Mees. & W. 378; 2 Railw. Ca. 877.

there was not, in fact, any drain or ditch available for the carriage of the road materials of the trustees. And the trustees had for many years used the cut for such purpose without paying toll. Yet the Court held that the Eau Brink Cut was not a "public or parish drain" within the 35th section, before mentioned, and judgment was given for the plaintiff in trespass (*i*). However, commissioners of sewers, who were accustomed to use a tidal ditch by the side of a highway, were held not liable to fence the sewer against the highway (*h*).

The same may be said of banks, which are mentioned in the 4. Banks. statutes, and which are nearly related to walls, and have the same doctrines applied to them. Private walls and banks, therefore, are not within the statute (*l*). It is said that inhabitants may make bye-laws for the repair of banks to keep out the sea (*m*).

With respect to the ownership of these banks and walls, Mr. Sergeant Callis takes a distinction, and holds, that a bank of the sea, or of a navigable river, belongs to him whose grounds are next adjoining, according to the principle adopted concerning highways. But the wall belongs to the party who is bound to repair it, though his land be not contiguous, because the erection is artificial, and the materials are brought thither, and do not, as in the case of a bank, arise in the place where the wall is (*n*).

If a company be permitted to have the use of a channel for the purposes of their navigation, they must repair the banks of the channel. As where a dock company were allowed to make a new cut: here they were held bound to the repair of it. And the remedy is either by indictment or mandamus. The company returned to a writ of mandamus that they were not liable

(*i*) *Coulton v. Ambler*, 13 Mees. & Wels. 403. The words "all other goods, wares, merchandize" (upon which toll was to be paid), were held also in this case to include gravel and other materials for the repair of roads.

(*h*) *Cornwall v. Metropolitan Commissioners of Sewers*, 10 Ex. 771.

(*l*) *Callis*, 76.

(*m*) 8 Mod. 354, *arguendo*.

(*n*) 23 Hen. 8, c. 5; and see *Callis*, 73—77; 7 Com. Dig. 341. Banks and walls are particularly mentioned in 3 Jac. 1, c. 14.

by the act to repair the south bank, and that they had as nearly as possible maintained the new channel of equal depth and breadth at the bottom, and of equal inclination of the sides with the old course or channel as the act ordained. The Court held this an insufficient return, and awarded a peremptory mandamus. It was a traverse of a matter of law, and an imperfect answer in other respects (*o*). And, by prescription, a corporation may be compelled to repair the banks of a river (*p*).

5. *Gutters.* Then, fifthly, we come to speak of a gutter, which is also mentioned in the statutes of Hen. 8, and of Jac. 1, therefore, such as interfere with, or promote public convenience, are within the first statute, and those within two miles of London are made expressly subject to the jurisdiction in question, by the statute of James.

Callis writes thus concerning the difference between a gutter and a sewer: "A sewer is a common public stream, and a gutter is a straight, private, running water; and the use of a sewer is common, and of a gutter peculiar" (*q*).

6. *Sewers.* This brings us to the subject of sewers, the origin and meaning of which have been formerly discussed, and these, as may well be supposed, are within the statutes. They, like the rest, when of a public nature, are within the act of Hen. 8, and are universally controlled by the commissioners when within two miles of London. And when they communicate with a navigable river, so that the maintenance of them becomes beneficial to commerce, or to individuals, as members of the public, according to an authority which we are now about to cite, these latter are also under the protection and guidance of the laws of sewers. It was an action of trespass, for taking the plaintiff's goods. The defendant pleaded the general issue, and a justification under the commissioners of sewers for the Tower Hamlets (excluding St. Katherine and Blackwall Marsh), for the non-

(*o*) *R. v. Bristol Dock Company*, 2 Q. B. Rep. 64; 2 Railw. Ca. 599; 1 Gale & D. 287.

(*p*) *Anon.*, Lofft, 556.

(*q*) *Callis*, 80.

payment of a sum assessed by them under 23 Hen. 8. Replication *de injuriâ*. A verdict was found for the plaintiff, subject to a case. It appeared, that the plaintiff's house, and the place where the work in question was done, were more than two miles from the city of London,* that the tide flowed and reflowed over part of the land where the work was done, but not over the whole, that all was marsh land, and twenty miles distant from the sea; that boats were accustomed to go on the shore from the Thames to a place about a mile and a quarter from the place where the work on the sewer had been done, that the plaintiff would have sustained injury if the work had not been done, and that the plaintiff had been rated to the sewers' tax in Hackney for several years then past. Much stress was laid by the counsel for the plaintiff upon the statute of James 1, which recited, that no sewers, &c., were within the 23 Hen. 8, unless the water ebbed and flowed therein, and unless free passage with boats, &c., to the sea had been theretofore used. And the counsel, moreover, observed upon the omission of this statute of James 1, by the learned Sergeant (Callis) taking occasion to impeach the correctness of the reading, by reason of that omission, after the praise which Lord Coke had bestowed upon the exposition of that statute. It was also objected, that the sewers and gutters contemplated by the Legislature must be understood to mean those only in the vicinity of the sea, such as immediately conducted the fresh waters to the sea; and not those at a distance from the ocean, for the jurisdiction would thus be made infinite.

The defendant's counsel said, in answer to the difficulty raised concerning the statute of James, that it was an explanatory act; and that the positive provisions of 23 Hen. 8, could not be restrained by the recital of 3 Jac. 1, for there was no enacting clause that sustained the recital alluded to. He was then stopped by the Court, who were quite clear that the defendant ought to have the verdict entered for him. As to the objection that this was not a common sewer, the stating it to be a sewer was *primâ facie* stating it to be a common sewer; and it was a common sewer, because it appeared that the tide flowed and reflowed there. It was intended by the

* And therefore not within the stat. 3 Jac. 1.

statute of Henry 8, that commissioners should have power in a case like the present, for here was a watercourse leading to the sea, and the tide flowed over part of the land where the work was done. Here it was essential for the public benefit, that the sewer should be cleansed, for there was a navigation, and the work effected would be doubtless serviceable to the interests of commerce; and, which was more, the plaintiff himself, as a member of the community, appeared to have derived benefit from the undertaking. And this circumstance could furnish an answer to the objection, that the power of the commissioners might become unlimited: here the party, over whose land the work was done, derived a benefit therefrom, and that alone was sufficient to give the commissioners jurisdiction (*r*).

Mr. Justice Buller also observed, that Callis's Readings was one of the best performances on the subject of sewers, and that it had always been admitted as good authority (*s*).

This case has been mentioned at some length, by reason of its importance, and of its being a leading authority upon the subject, all practicable objections having been made to the authority of the commissioners by the plaintiff's counsel in an argument of very considerable duration. It will not, it is hoped, be thought irrelevant, if we sum up very briefly the consequences of this weighty decision. Whatever might have been the ancient opinions on the point, it now seems clear, that all sewers, which communicate either directly or indirectly with navigable rivers, both common and private, are within these laws, if their maintenance be for the advancement of commerce, or for the benefit of society at large; and that all sewers, of every sort, within two miles of London, are committed to the jurisdiction of the commissioners, by virtue of the statute of James 1, so often above referred to (*t*).

One consideration, however, upon this particular head, still remains, and it is with respect to *new* sewers. And the point becomes of the greatest importance, because, although noticed

(*r*) *Dore v. Gray*, 2 T. R. 358; and see 3 M. & S. 447.

(*s*) 2 T. R. 365. So *Cockburn*, C. J., 31 L. J., Q. B. 273.

(*t*) See *Callis*, 87, 88, in the notes.

here under the word "sewers," the principle extends to all kinds of new defences, walls, banks, causeways, &c.

Thus, by 2 Will. & M. sess. 2, c. 8, s. 14, after a preamble, that many new sewers, sinks and vaults, had been made within the city and liberty of Westminster, the city of London, the suburbs and liberties thereof, the out parishes in the county of Middlesex, and in the borough of Southwark, and other places within the weekly bills of mortality in the county of Surrey, which, since the expiration of an act passed in the reign of King Charles 2 (*u*), had been much neglected, and had become nuisances to the inhabitants, because of some doubt whether such new sewers were within the jurisdiction of the law of sewers: it was therefore enacted, that all new sewers at any time since the 12th year of the reign of King Charles 2, made in any of those parishes, should be thenceforth subject to the commission of sewers, and to the laws of sewers, as if originally made so subject, and liable to the survey of commissioners; and that commissioners for the time being should have power, within the limits of their respective commissions, to alter, amend, cleanse, and survey, any such new sewers, &c., and to order and direct the making of any other new vaults and sewers, and to cut into any drain or sewer already made, and to alter or take away any nuisances in the same, and alter or take away any cross gutter or channel, in all or any of the streets and lanes in the said parishes.

And now by the stat. 3 & 4 Will. 4, c. 22, s. 10, a considerable latitude has been given to the jurisdiction of sewers. All existing sewers and defences are recognized as being within the reach of the commissioners, provided they communicate with navigable rivers, and all new sewers are included within the same clause. And the only restriction imposed upon commissioners is, that they must not interfere with such private watercourses as were in existence at the time of the passing of that act. The section shall be set forth in full by reason of its importance. It begins by saying, that doubts had arisen as to the extent of the jurisdiction of commissioners of sewers.

(*u*) 13 & 14 Car. 2, c. 2.

And it then goes on to enact and declare, that all walls, banks, culverts, and other defences whatsoever, whether natural or artificial, situate or being by the coasts of the sea, and all rivers, streams, sewers and watercourses, which now are or hereafter shall or may be navigable, or in which the tide now does or hereafter shall or may ebb and flow, or which now do or hereafter shall or may directly or indirectly communicate with any such navigable or tide river, stream or sewer, and all walls, banks, culverts, bridges, dams, floodgates, and other works erected or to be erected in, upon, over or adjoining to any such rivers, streams, sewers or watercourses, shall be from henceforth, to all intents, constructions and purposes, within and subject to the jurisdiction of commissioners of sewers: Provided always, that nothing herein contained shall authorize or empower any commissioners of sewers to exercise authority or jurisdiction upon or over any dams, floodgates, or other works erected for the purpose of ornament, previous to the passing of this act, in, upon or over any rivers, streams, ditches, gutters, sewers or watercourses, near or contiguous to any house or building, or in any garden, yard, paddock, park, planted walk, or avenue to a house, without the consent in writing of the owner or proprietor thereof respectively first had and obtained.

And not only are these old and new sewers and other works placed under the control of commissioners, but they are also empowered by the same statute to make and maintain new works, as we shall see in the sequel of this chapter, where the cases concerning works are likewise collected.

It has been held, that under the statute of 23 Hen. 8, and this statute of Will. & Mary, not only may commissioners of sewers make these new sewers, but they may likewise unite levels which were before separate, and separately assessed. Still, in such a case there must, after the union, be one uniform sewers' rate (*x*). By 11 & 12 Vict. c. 63, s. 145, no commissions of sewers are to be interfered with by Local Boards under

(*x*) *St. Katherine's Dock Company v. Higgs*, 14 L. J., Q. B. 348; affirmed in error, 6 Q. B. 641; 16 L. J., Q. B. 377; *post*. See *Harrison v. Stickney*, 2 H. L. Cas. 108; *post*.

the Public Health Act, nor can any private watercourses be so dealt with, unless a consent in writing be first had.

Gotes, or goats—a word derived from the Saxon—are de- 7. Gotes.
fined to be “engines erected and built with perculleses and doors of timber, stone or brick” (y); and they are within the management of commissioners, being very useful for drainage. Their use is said by Mr. Sergeant Callis to be twofold; the first, to cause fresh water which has descended upon the low grounds to be let out through them into some creek of the sea; and the second, to return back salt waters direct, which during some great floods of the sea may have flowed in upon the land (z).

With regard to the making of new gotes, it will be seen hereafter what power the commissioners have in these respects, when we come to detail the different works which they may direct.

Gotes are also mentioned in the statute of James (a).

Eighthly, we come to calcies, said to be derived from the 8. Calcies.
Latin *calx*, and to signify a common hard way, maintained and repaired with stones and rubbish; or, as Mr. Sergeant Callis has it, “a passage made by art, of earth, gravel, stones, and such like, on or over some high or common way leading through surrounding grounds, for the safe passage of the king’s liege people” (b). They are more commonly called causeways. There was a tax formerly paid by neighbouring inhabitants, towards the making and repairing the common roads above alluded to, and it was called *calcagium*. The authority of those who had the management of sewers over these causeways is said to be very ancient; they are mentioned in the Register, and by Fitzherbert (c), and are expressly noticed in the old statute of 6 Hen. 6 (d), the first act which prescribed a regular commis-

(y) Callis, 91.

(z) Ibid. Many of these gotes in the highways serve also for bridges.
Callis, *ubi supra*.

(a) 3 Jac. 1, c. 14.

(b) Callis, 90.

(c) F. N. B. 296.

(d) 6 Hen. 6, c. 5. And see Callis, 90.

sion of sewers, as we have seen. It is worthy of observation, that the same principle—that of acting for the public benefit—applies to all these transactions. And, therefore, the commissioners of sewers have no concern with causeways on high roads, but with such only as have been constructed upon low grounds, because the maintenance of the latter conduces to the public convenience in that respect. Nevertheless, such causeways as lead over the bridges which are within the statute, and to which we shall presently advert, are subject to the jurisdiction of the court of sewers (*e*). Causeways are expressly included within the statute of James (*f*).

9. Bridges. Bridges within the scope of the laws of sewers are said to be such as lie on or near surrounded grounds, and those also which are built on highways; and for this reason, because they have been built over rivers which are within the laws (*g*). And thus it is that causeways leading over such bridges are themselves subject to the commissioners. Further, bridges which lie out of highways, if they be constructed upon a common sewer having its current to the sea, or to some river, are equally within the statutes; and so also are private bridges, so far as that, if they become annoyances to the public, they may be removed by order of the above-mentioned authority (*h*). However, bridges in highways where there is no stream, except a land stream in time of floods, are dry bridges, and not within the commission (*i*).

It may be added, that notwithstanding the words of the Great Charter, that no vill nor freeman be distrained to make bridges, unless he have been bound to the same from time immemorial, whereby it might seem, that no bridges erected since the reign of Hen. 2 were repairable, and so not within the jurisdiction of the commissioners; yet the better opinion seems to be, that as well those which have been mentioned by the statutes of Hen. 8, namely, bridges on highways, as others, are within the laws of sewers, although erected since time of memory (*k*). And the principle of law now applicable to new bridges is this, that if

(*e*) See Callis, 90.

(*f*) 3 Jac. 1, c. 14.

(*g*) Callis, 86; 7 Com. Dig. 341.

(*h*) Callis, 87, &c.

(*i*) Id. 89.

(*k*) See Callis, 86.

they appear to be public benefits, the county wherein they are is bound to keep them in repair.

Bridges are expressly mentioned in the statute of James (1).

The word "trenches" is also to be found in the statute of Hen. 8, although it does not occur in that of James 1. And here the same distinction between public convenience and private enjoyment must be taken; so that if a trench communicate with a common sewer, or a great river, so as to be of consequence towards the general interest, it lies, although on private grounds, within the jurisdiction of the officers of sewers. ^{10. Trenches.}

And now, leaving this part of the subject for the present, we will briefly recapitulate the annoyances, lets and impediments, of which the act of Hen. 8 treats; it being remembered, that the duties of the commissioners above rehearsed are twofold; first, as they relate to the repairing of defences; and next, as to the extinguishment of nuisances. Let us see what these hindrances are, against which the statute is directed. ^{Annoyances.}

Although streams, rivers and other waters, when confined within their due and accustomed channels, are highly beneficial to commerce and to the community, yet if the stream swell into a torrent, if the river overleap its banks, and the spring bubble forth its fountains with a violent and unrestrained force, those which were before useful streams become, to use the language of the statute, lets, impediments and annoyances. Thus, the act of Hen. 8 speaks of outrageous springs. Nevertheless, Mr. Sergeant Callis rather complains of the word "outrageous," observing, that many springs are entitled to defence under these laws; and he notes the difference between public and private convenience, to which we have so frequently adverted. For he says, that commissioners of sewers cannot aid a township in want of water for the use of their cattle, &c., by supplying them with water from another township, because the commission extends no further than to preserve navigation and drainage. ^{1. Outrageous springs.}

(1) 3 Jac. 1, c. 14.

Still, if there be a river navigable in a township, the waters of which be dried up or decay, and in the neighbouring township there be another river, with abundance of water, here the commissioners of sewers may interfere, because the navigation of the county is thereby benefited (*m*).

2. Mill-streams or dams.

Mill-streams or dams may likewise be annoyances. It is sufficient to say in this place, that whether a mill be erected on a navigable river, or on one not navigable, it is within the provisions of the stat. of Hen. 8, if the removal of it be for the public convenience. And the same may be said of the mill-streams or dams (*n*).

3. Wears, fish-garths, kedels, gores.

Wears, fish-garths, &c,—which latter come under the *nomen generale* of wears—are made subject to the jurisdiction of the commissioners, who may treat them as annoyances or not, as they shall see fit for the public good.

4. Gotes, flood gates, locks.

Gotes, of which we have spoken already, as being extremely useful upon some occasions, are reckoned here amongst the annoyances; for their situation may sometimes be as prejudicial to the free discharge of flood, or other waters, as serviceable at others. Flood-gates and locks are of the same nature, and may be considered as partaking of the same incidents.

5. Hebbing-wears and hecks.

Hebbing-wears and hecks come under the same provisions, and are liable to similar interference. The former are laid for the purpose of catching fish at the ebbing tide.

6. Ponds.

Ponds are also classed amongst the impediments to be dealt with at discretion; and thus, if commissioners find, that according to their plan of drainage such waters interfere, they may direct them to be filled in, drawn off, or otherwise abated. According to the definition of Mr. Sergeant Callis a pond is “a standing ditch, cast by labour of man’s hands in his private grounds, for his private use, to serve his house and household

(*m*) Callis, 84. And see Id. 85.

(*n*) See *Swaine v. Rogers*, Cary, 26.

with necessary waters" (*o*). And the learned expositor observes, that but for its being mentioned in the statute by name, he should not have classed a pond amongst the impediments, nor by any construction have brought it within the act (*p*). And certainly, if a pond were in private grounds, there would rarely be any occasion for meddling with it; but as we frequently find these stagnant waters upon commons, greens, by the sides of lanes, &c., they may occasionally hinder a drainage which is of public importance, and thus they seem to fall fairly within the cognizance of those whose business it is to remedy and remove annoyances.

The difference between a pool and a pond is, that the one is Pools. by nature, the other the work of art (*q*). The pool is a mere standing water, without any current at all (*r*). Pools are not mentioned in the statute, and it is said that they are not within it, for two causes; first, because they are, "both in property and use, private and peculiar;" and, secondly, because these laws of sewers seem to apply to lands which are "casually and not continually drowned" (*s*). But the main principle seems to be, whether these pools be hindrances to navigation, or annoyances to the public; for in either of these cases they may certainly be removed; and the learned sergeant adds an opinion to that effect (*t*). We began this account of the things which were placed under the survey of commissioners, by laying down the principle of public convenience above referred to; and it has been found unvarying and consistent, throughout the progress of the inquiry on this branch of the subject.

The survey being made, it next becomes expedient for the commissioners of sewers to acquaint themselves with the names of the proprietors of land in the neighbourhood, and within the limits of their commission, in order that they may be in a condition to assess each party in a proper and impartial manner.

Inquiry into the ownership of lands, and into defaults.

(*o*) Callis, 82.

(*p*) Ibid. And see Id. 83.

(*q*) Id. 82.

(*r*) Ibid.

(*s*) Ibid.

(*t*) Ibid. A conduit is not within the laws of sewers. (Callis, 83.) Something more will be said concerning the survey, when we come to speak of the surveyor as one of the officers of sewers.

That being done, and it appearing, at the same time, that several defences are in need of repair, and that several nuisances are in operation to the general detriment, it is incumbent on the commissioners to satisfy themselves, whether any particular individual has made default, and neglected his obligations; whether any one has committed an encroachment, or lent his aid to the establishment of any annoyance prohibited by their laws, or whether there be not a general want of repair in some places, the expense of defraying which should be imposed upon the whole level, or other district within their commission. It seems, therefore, an important matter to consider, first, who are liable in respect of some benefit which they receive from the enforcement of the laws of sewers as private individuals, for there must be some general or particular benefit; and secondly, who are liable within the level to repair those defences, to the maintenance of which no one stands pledged independently of the rest (*u*). The defences to be thus repaired,* and annoyances which commissioners may destroy, will be subsequently mentioned, as we have only as yet noticed such as come under their survey, and have not discussed their power of directing repairs, or of extinguishing nuisances, upon which subject some new questions have occasionally arisen.

With respect to the repairs, we shall consider,—

I. Who are bound to repair as individuals.

II. Who are so bound in a corporate capacity.

III. Who bound when the charge is thrown upon the public at large.

Repair.
Who liable
as individuals.
Owners.

Owners of defences of the nature above alluded to, are bound to the repair of them, upon the principle that every one should maintain that which is his own. And this they will naturally be anxious to do, inasmuch as their land, in such cases, lies

(*u*) See 1 B. & C. 484, per Abbott, C. J., that one or the others are liable.

* And herein we shall speak fully concerning the making of *new* defences, upon which so much discussion has taken place.

nearest to the waters; but they cannot ask contribution at the hands of others, for their expenses upon those occasions (*x*). And this is similar to the case of a ditch adjoining a highway, for there the individual whose lands lie close to the road is under an obligation to keep the ditch in a proper condition, and this without the force of a prescription (*y*). The owner of the land in question is interested in the defence, because he has an immediate benefit by the repairs, and would be subject to serious injury through the neglect of it. As in the case of the flood-gates of a mill, where the Court considered, that the repair fell necessarily, in the first instance, upon the owner of the mill (*z*).

The occupier, however, is involved in the obligation of cleansing a watercourse as far as the weeds and soil upon his banks are concerned. He may take these matters for his own use, or he may require the commissioners of sewers to remove them, and the commissioners, in their turn, may remove them of their own motion, in case the occupier should neglect to do so. The stat. 3 & 4 Will. 4, c. 22, ss. 22 and 23, provides for this. Thus by the 22nd section, it shall and may be lawful for the occupier for the time being of land lying next and adjoining to any river, sewer, or watercourse within and subject to the jurisdiction of commissioners of sewers, at any time within six calendar months from and after any gravel, soil, mud, or earth shall have been cast or deposited upon the banks of such river, sewer, or watercourse, by the order of any surveyor, bailiff, expeditor, or other officer of sewers, and at any time within six weeks from and after any rushes, flags, or other weeds shall have been cast or deposited upon such banks as aforesaid, to take and remove for his own use such gravel, soil, mud and earth, and such rushes, flags and weeds respectively: Provided always, that such gravel, soil, mud and earth, and such rushes, flags and weeds respectively, shall be removed at least ten feet from the land side of the banks of such river, sewer or watercourse.

(*x*) Callis, 223. That the level may sometimes be liable in case of the owner's default. See *post*.

(*y*) 8 Hen. 7, 5.

(*z*) *Inhabitants of Oldbery v. Stafford*, 1 Sid. 145.

And by sect. 23, if any such occupier shall neglect to remove such gravel, soil, mud or earth as aforesaid within such six calendar months as aforesaid, or such rushes, flags or other weeds as aforesaid within such six weeks as aforesaid, for his own use, then and from thenceforth respectively it shall be lawful for any such surveyor, bailiff, expeditor or other officer of sewers, with workmen, horses, carts, carriages, barrows and other necessary tools and implements, at any time or times in the day-time to enter upon the land of such occupier, and to take away and remove therefrom such gravel, soil, mud and earth, and such rushes, flags and weeds respectively, and also for such purposes to pass and repass, at any time or times in the daytime, through and over any other lands lying between the nearest highway and the banks of such river, sewer or watercourse: Provided always, that if the owner or occupier of the land upon which any such gravel, soil, mud, earth, rushes, flags or weeds shall have been deposited shall require the commissioners of sewers to remove the same, such commissioners shall, within six weeks after such requisition as aforesaid, cause the same to be removed from and off the said land.

Indeed, the general liability of draining sewers rests upon the occupier, though not the repair of defences. So that where the words "owner and proprietor" only were used in a declaration complaining of the bad repair of certain sewers, without "occupier," the count was held bad on general demurrer, for the duty of cleansing does not belong to the owner, merely as such (a). Neither, again, are trustees under an act of Parliament for improving navigation liable, without express words. As in the case of the trustees for the improvement of the river Parrett. These trustees were empowered to take tolls, but the Court held, that they were not liable to clear any weeds, nor to undertake the sewerage of the river, for there was no express enactment to that effect, and the weeds, though injurious to neighbouring lands, were no detriment to the navigation (b).

(a) *Russell v. Shenton*, 3 Q. B. 449.

(b) *Parrett Navigation Co. v. Robins*, 10 Mees. & W. 593; 3 Railw. Cas. 383; 1 Gale & D. 223. See also upon the subject of cleansing, *Bell v. Twentyman*, 1 Q. B. 766.

There must, as we have already noticed, be some benefit accruing from improvements done by commissioners of sewers.

Thus where, in trespass, the defendant justified under commissioners of sewers, it was shown, that all grounds within the level were chargeable; but as it also appeared that the plaintiff, in this case, had neither benefit nor prejudice, the distress in question was held ill taken, and the verdict was for the plaintiff (*c*).

So also a decree to charge an adjacent town, which failed to state that the town had received any damage, (and from whence it would follow, that the repair could not benefit the inhabitants,) was quashed for that reason (*d*).

So in the case of the Isle of Ely, it was held by the Court, that none could be taxed towards the reparation, except those who had prejudice, damage or disadvantage, by the nuisances or defaults, and who might have been benefited by the reformation or removing of them (*e*).

And the same doctrine was sustained in another case. The plaintiff brought trespass for taking his goods. The defendant justified under the commissioners of sewers of the Holborn division. The plaintiff had a verdict, subject to a case. It appeared that he lived at Hampstead, within the Holborn division, that his basement story stood three hundred and seven feet above the level of the crown of the arch of the great northern sewer at Battle Bridge, so that the stopping of that sewer could not possibly throw back the water to the injury of his premises. The drains from his house ran into other drains in the parish of Hampstead, communicating with and falling into the river Fleet, and all falling together into the great northern sewer at Battle Bridge, and being thence ultimately conveyed into the Thames at Blackfriars Bridge. The ancient water-course of the Fleet had been covered by the commissioners of sewers as far upwards as Battle Bridge, but the plaintiff had

(*c*) *Anselm v. Barnard*, 2 Keb. 675.

(*d*) *Rex v. Wright*, 2 Keb. 42.

(*e*) 10 Rep. 142.

never received any additional benefit from the covering of this watercourse. Further, the premises of the plaintiff had never been rated in that or in any other division, and his waste water was carried off quite independently of the works of sewers. The counsel for the defendant endeavoured to argue, that it must be taken that the plaintiff received an advantage from the communication with, and also from the cleansing and keeping open of the sewer, which the commissioners had done at their own expense. But the Court recognized the principle of benefit or no benefit, and gave judgment for the plaintiff (*f*).

So in a subsequent case, where it appeared that the plaintiff derived no benefit from the sewer, in respect of the sewer rate for which she was assessed, it was objected, that as the plaintiff's house was situated within the district to which the jurisdiction of the commissioners of sewers extended, a presentment and decree made were conclusive against her. But the Court held differently, observing, that in *Masters v. Scroggs*, the party lived within the levying of the assessment, and yet was allowed to recover, because no benefit had accrued to him from the sewer rate then in question. Evidence, therefore, in this case, being deemed admissible, to the effect that the plaintiff had received no benefit from the sewer, a rule for a new trial was made absolute (*g*).

Yet, as soon as it appears that a benefit has been derived from the sewerage, the Court will not enter into the question of the *quantum* of benefit. They will leave that to the discretion of the Court of Sewers (*h*).

Mr. Sergeant Callis had previously advocated the same doctrine; for he says, in more than one place, where he mentions

(*f*) *Masters v. Scroggs*, 3 M. & S. 447.

(*g*) *Stafford v. Hamston*, 2 Brod. & Bing. 691; 5 Moore, 608. The defendant had a verdict at the second trial, it clearly appearing that the plaintiff had a benefit.

(*h*) *St. Katherine's Dock Company v. Higgs*, 14 L. J., Q. B. 348; affirmed in error, 10 Q. B. 641; 16 L. J., Q. B. 377; *ante*, 76, and *post*. See also *St. Botolph's Overseers, apps., Whitechapel Board of Works, resps.*, 29 L. J., M. C. 228. See, likewise, *Dorling v. Epsom Local Board*, 24 L. J., M. C. 752; 5 El. & Bl. 471; *Metropolis Board of Works v. Vauxhall Bridge Company*, 26 L. J., Q. B. 253, *post*; *R. v. Head*, 3 Best & Sm. 419; 9 Jur., N. S. 871; 32 L. J., M. C. 115, and *post*.

the authority of commissioners to tax the level, that a benefit must be the result of the assessment (*i*).

And again, "All such which reap profit, or sustain damage, shall be assessed" (*h*). The learned sergeant also points out some lands which he considers to be exempt from the burden of repair, upon the principle of a *want of benefit*. Such as grounds lying between the sea banks and the seas, and grounds upon an ascent, and not upon the level (*l*).

Although the benefit be not immediate, yet if there be a general benefit, it is sufficient. As if property should be benefited by reason of neighbouring ways being properly cleansed and drained, especially where the sewers which drain it have always been repaired by persons, although independently of the commissioners (*m*).

Again, all who have *ease and passage* by rivers ought to cleanse and scour them; and such as have lands adjoining to rivers, are not liable to cleanse, unless they have some benefit, as a toll, fishing, &c. (*n*).

Next, it may be observed, that if the grounds of any one Frontage. adjoin the sea, a common law liability, which the statutes have confirmed, arises to compel that person to defend his land at his own charge. And this is called the custom of frontagers, which, like the badge of ownership above mentioned, can only be put off by showing in particular that some other persons are bound by prescription, or otherwise (*o*).

Very analogous to these is the use of a sea-wall or bank, or Use. of rivers. This use, or "*usus rei*," compels the party having the enjoyment to the repair or cleansing, independently of any other consideration; but he may show that another is liable. A commission was issued, in very old times, to inquire concern-

(*i*) Callis, 145, 147.

(*h*) Id. 222.

(*l*) Ibid.

(*m*) *Soady v. Wilson*, 3 Ad. & El. 248; 4 Nev. & M. 777.

(*n*) See Callis, 223, in the note; and *Syson v. Johnson*, 8 B. & C. 796.

(*o*) See Callis, 115, 121.

ing the stoppage of a river. It was found, that the river had been stopped, in consequence of non-user, since the last plague, and that it had not been cleansed within time of memory; but it was also found, that the abbot of D. was lord of the manor on one side of the river, and the Earl of H. on the other; that they had a fishery there, and that four villis had an easement to pass along the river. This presentment being returned into the King's Bench, the abbot and earl were distrained to show cause why they should not repair this stream; and they said, that those who had the use of the river, namely, the villis in question, ought to do the cleansing required. And by Green, C. J.: As you do not deny that you have a fishery there, if it should be found that these villis have not their passage along the stream, you two will be charged with the entire cleansing (*p*).

And so it is where one has been accustomed to use a river by sailing up and down, by having a ferry, or a staith to go up and down, or a crane, or other engine, to draw up the waters (*q*).

However, these three liabilities may be answered, by showing some other charge arising by tenure, prescription, &c.

Tenure.

And, therefore, if a man be found to hold the land in question by tenure, he must do all that is incident to that tenure, and, consequently (as is most usually the case), he may be bound to do the repairs to such defences as may be upon his land. And thus in a case where James Fitz-James brought trespass against the master of St. Mark in Bristol, alleging that the master ought to have repaired a ditch by reason of his tenure: it appearing that the master and his predecessor had held the land there from time immemorial, he was held liable to the obligation (*r*).

And it is said, that if a man be bound by tenure to the repair of a wall, sewer, &c., he shall be charged alone (*s*).

(*p*) 37 Ass. pl. 10. And if it were found the other way, both parties would be jointly liable. Callis, 121, citing 38 Ass. pl. 15.

(*q*) Callis, 120.

(*r*) 12 Hen. 4, 7; and see Callis, 117; 17 Vin. Ab. 286, pl. 8; 21 E. 4, 73.

(*s*) 7 Com. Dig. 345, citing 10 Rep. 139, 140.

So, again, prescription or custom will clothe a person with this liability. But the principle must be received with a proviso, that the land is bound, and not merely the individual. Thus, where trespass was brought against a man, for that he and all those whose estate he had in certain land, were bound to sustain and repair certain banks of the sea; and that through the default of the defendant, by not repairing, the sea had surrounded the plaintiff's land, it was prayed that the plaintiff should take nothing by his writ, because the defendant had nothing in the land alleged to be bound to this repair; and subsequently the Court agreed to that, and the writ was dismissed (*t*).

Prescription and custom.

In another case, it was laid down, that one might be bound to repair a bank or wall, by reason of residence (*u*); but this, says Mr. Sergeant Callis, must apply to the house in which the party dwelt (*x*); and then the land would be bound to the obligation.

And so, again, descending charges will not bind the heir, unless the latter have assets as a consideration for the charges; nor will descending assets, on the other hand, bind the heir, if the land itself be not bound (*y*).

The obligation by tenure differs so far from that by prescription, as that one may be under a liability in respect of the former, without evidence of an immemorial charge, although repair from time out of mind is evidence of an obligation by tenure, whereas a prescriptive burthen must be evidenced by an immemorial usage to repair.

A body of persons, as a corporation, a township, &c., may also be charged by virtue of a *custom*; and that, of course, implies a liability from time immemorial. All these peculiar obligations by tenure, custom, prescription or otherwise, may be commuted for money by commissioners with the consent of the

(*t*) 7 Hen. 4, 31.

(*u*) Keilw. 52.

(*x*) Callis, 116.

(*y*) Id. 117. See also *Austye v. Fawkener*, Cro. El. 446.

inclosure commissioners (z). By sect. 35, the commutation may be in gross, or by way of annual charge, and the recovery of the sum may be as a tithe rent-charge is now recoverable, and it shall have priority over all present or future incumbrances on the land charged. The record of the charge is to remain with the clerk of the peace for the county in which the district, or the greater part, is situate, and it is declared to be evidence, or any certified copy of it (a). The 37th section saves all existing liabilities, subject to the provisions of the last-mentioned section.

The stat. 11 & 12 Vict. c. 63 (the Public Health Act), preserves all previous obligations, whether by tenure or otherwise. The 118th section enacts, that the liability of persons to defray or contribute towards the expense of making, &c. any sewer, or any work or works, for protecting the land against the force or encroachment of the sea, or of paving or flagging, &c. any street, or part thereof, within the district, shall, if incurred previously to the application of the act, continue. And the rates made under the act shall only be applied to those purposes to which such liability does not extend.

Covenant.

A man may clearly agree by deed to bind himself to do certain repairs of this sort; but it is observable, with reference to that which has already been said, that the covenant so entered into will not affect heirs, although they be expressly bound,* unless assets, conveying a consideration, descend to the heirs. And a sewers rate is not a parliamentary tax, not being imposed directly by Parliament; so that a lessee is not bound to pay it under the general covenant to pay taxes (b). But where marsh lands were demised to the defendant, subject to a condition that he should pay all outgoings whatsoever, rates, &c., land tax only excepted, he was held liable to the sewers rate. There had been an extraordinary assessment by the commissioners of sewers for work which conferred a permanent benefit

(z) 24 & 25 Vict. c. 133, s. 34.

(a) Sect. 36.

* By the word "heirs." Callis, 119.

(b) *Palmer v. Earith*, 14 Mees. & W. 428.

on the land (*c*). Mr. Sergeant Callis makes the following distinctions with respect to tenure, prescription and covenant. If land be charged by tenure, it is immaterial in whose hands it may fall; for whether the possessor be heir or stranger, he must repair. But the descent of land which has been repaired (it may have been voluntarily) by prescription, does not necessarily bind the heir, for there must be a consideration. A third, and as it were a middle point, however, remains; and it is, where assets descend to an heir whose ancestor has bound him by covenant; here the descent of assets concludes the heir, and makes him subject to the charge (*d*).

And there is, moreover, a difference between a covenant entered into by a stranger for this purpose, and the occupier of the lands, as far as the jurisdiction of the commissioners is concerned, since they may enforce the latter's covenant, though not that of the former: as where a lessee had covenanted to pay all assessments made towards the repairs of his premises, which were liable to invasions of the sea. A straight wall, built there as a defence, was thrown down by a tempest, and a new one, in the form of a horse-shoe, was constructed; for the making of which the level was taxed, and amongst others this lessee, the lessor not being charged at all. He was also charged with interest. The lessee then died, and his executor entered, whom the commissioners charged with the sum in question. No less than five points were made in this case; first, whether the collateral covenant were within the jurisdiction of these commissioners, the case having been carried into the King's Bench by the executor. And the Court held, that the covenant on the part of the lessee was within the jurisdiction of the commissioners; for he not only had a benefit by it, but he also had agreed to pay all taxes concerning the premises. But Brampston, C. J., allowed, that had the covenant proceeded from a stranger instead of the occupier, it could not have been enforced by the officer of sewers (*e*).

(*c*) Waller *v.* Andrews, 3 Mees. & W. 312; Bennett *v.* Womack, 7 B. & C. 627. See R. *v.* Justices of Kent, 29 L. J., M. C. 191.

(*d*) Callis, 117, 118.

(*e*) Commins *v.* Massam, Mar. 108.

Next, it was said, that here was a new wall, and that the lessee had never agreed to repair any of the old defences. But Brampton, C. J., said, that every man's covenant should be construed most strongly against himself; and that if the covenant might not extend to the new wall, it were vain and idle; and, besides, the tax was for the reparation of the premises, of which the new wall subsequently formed a part (*f*).

Whether the covenant extended to the executor, was the next question, who, moreover, now alleged a want of assets; but the Court said, that he should have made that objection before the commissioners; and that they by not denying the possession of assets then, his advantage had been lost, and he must be intended to have them (*g*).

In this case also, the lessee had been entrusted to collect the money from the level; and having held it some time, the commissioners charged him with interest; and the Court considered that they had done right, for it was reasonable that he should be thus charged; and the commissioners having cognizance of the principal, had also cognizance of the accessory (*h*). The plaintiff was the mortgagee of a lessee under a building lease. He took possession upon a breach of covenant by the lessee. There were covenants to make a road-way, and to make good and sufficient drains to carry off the foul water. These covenants were disregarded, and the plaintiff suffered judgment by default in ejectment, but filed a bill to be reinstated. However, it being shown that the drains were inefficient, the Court refused the relief prayed (*i*).

By the terms
of a grant.

Again, there may be an obligation of this kind arising from the terms of a grant. As in the case of a grant from the Crown, where the previous responsibility to repair is said to shift from the Crown to the grantees or patentees. An action on the case was brought for a neglect to repair sea-walls. King Charles I., it appeared, had conveyed the borough of Lyme to the mayor and corporation of that place; and in the letters patent a

(*f*) *Commings v. Massam*, Mar. 108.

(*g*) *Ibid.*

(*h*) *Ibid.*

(*i*) *Nokes v. Gibbon*, 26 L. J., Ch. 433.

condition was inserted, that the corporation should repair all the sea-walls there. It was moved to arrest the judgment on a verdict which had been taken for the plaintiff, on two grounds; first, that no other than the Crown could take advantage of a breach of the above condition. Secondly, that although an individual might sue a public officer for neglect of duty where no grant existed, yet that where a person could never have obtained a given benefit, except as resulting incidentally from a contract between the Crown and its grantee, the loss of that benefit was not a wrong for which he could claim any redress by action. But the Court repelled these objections. The charter was given expressly for the protection of the land, and the walls, which were to be kept up for that purpose, had been suffered to go injuriously to decay, so that the houses on the land became damaged. And the mayor and the corporation, moreover, took this property liable to the repairs which were incident to it. The king was liable to the repair of these walls before his grant, and thus the repairing of them shifted from the Crown to the corporation, upon their acceptance of the charter. The corporation too were responsible whether they had particular funds or not for that purpose, and the learned Judge who tried the case was considered to be justified in having rejected evidence to show a want of funds. Here the defendants had obviously neglected a duty which they owed to the public, and amongst others to the plaintiff; and their omission being wilful, and not the result of any unforeseen or extraordinary accident, was properly followed by an action at the suit of the injured party. The rule, therefore, for arresting the judgment was discharged. A verdict had been entered for the defendants, on the counts charging them with the repair *retum tenuræ* (k).

Lastly, persons may be made liable by the laws and ordinances of sewers, provided the commissioners do not interfere with the general law of the land, nor extinguish individual liabilities; but we shall have an opportunity of enlarging upon this when we come to speak of assessments generally upon the level.

Laws of
sewers.

(k) *Henley v. The Mayor and Burgesses of Lyme*, 5 Bing. 91. Judgment in this case affirmed, 3 B. & Adol. 77. And again in the House of Lords, 1 Bing. N. C. 222.

And thus the obligations of particular individuals have been laid before the reader, as far as their liabilities in respect of their lands are concerned.

Repair.
Corpora-
tions.

Some observations regarding corporate and aggregate bodies remain for our consideration. And, first, corporations may be bound to do these repairs by custom (*l*). So also a body of persons may be holden to an agreement for the same purpose. Thus, articles of agreement had been made between the king and Sir C. V., &c., for the draining of Hatfield Level, in Lincolnshire, Yorkshire, &c. The king was to have one part of the lands drained, the drainers another, and the tenant and commoners the third; and in consideration thereof, the drainers agreed that their third part should make and maintain enclosures. The plaintiff, who was no party to the articles, was subsequently assessed by the commissioners of sewers for lands in Yorkshire, upon which he filed a bill in the Exchequer, praying relief, and that all those who had lands chargeable might be called upon to contribute. And although it was objected, that the plaintiff was no party to the original agreement, yet the Court decreed as prayed, for the plaintiff had been aggrieved through the default of the drainers, who had entered into the obligation to keep up the banks, and so came within the equity of the statute 23 Hen. 8 (*m*).

Townships.
Parish, &c.

So again, although not usual, it seemed to be the better opinion, that a township might be made the subject of a separate assessment by special custom, but not otherwise, though Mr. Sergeant Callis entertains a different opinion (*n*). The earliest case upon this subject seems to be that above quoted from the book of Assises, where the four townships were deemed to be chargeable towards the repairs and cleansing of a river, by reason of their having had the enjoyment of it (*o*).

Again, in the 12th year of King James I., the town of M. was assessed 5*l.*, and that of T. as much, and upon distress, and

(*l*) Callis, 116.

(*m*) Earl of Devonshire v. Gibbons and others, Hardr. 169.

(*n*) Callis, 122, 129, where the arguments of the learned writer are given.

(*o*) 37 Ass. pl. 10.

a justification in *replevin*, there was a verdict for the defendant ; and it is said, that no great scruple was then made of the assessment being laid generally upon the whole town (*p*). “Which case,” says the learned writer on Sewers, “I specially noted, because it was tried and passed for current before the said Sir Edward Coke, who had the year before reported the law in his Tenth Report to the contrary” (*q*). This report of Lord Coke was of the case of the Isle of Ely, where one question was, whether the commissioners of sewers were warranted in assessing certain townships. And it was resolved, that the tax generally of a several sum in gross upon a town could not be supported, and that it ought to have been upon every owner or possessor of lands, tenements, rent, &c. (*r*).

So, some years afterwards, it was mentioned before the council at Whitehall, as the opinion of Popham, C. J., amongst other things, that commissioners of sewers could not lay a tax or rate upon any hundreds, towns, or the inhabitants thereof in general, but that they must charge every man according to the quantity of his land or common (*s*). And although the Court did not approve of that regulation, it has, nevertheless, been since recognised as good law (*t*). The same position was laid down afterwards by Roll, C. J., who observed, that the tax ought to be particular, and that it should not be laid upon the townships, unless there was a custom for it (*u*).

Such a custom, however, said the Lord Chief Justice, may be reasonable ; and in fact such a custom was alleged in the case then before him. It was said, that the commissioners were not bound to lay the tax upon lands equally throughout the vill, because the custom might be to the contrary, and might yet have a reasonable construction ; that is to say, the custom of marsh land, for the speedy repair of breaches, to prevent public danger. The Court adjourned the case, and the same

(*p*) Sir Philip Conisby's case, cor. Coke, C. J., Callis, 128.

(*q*) Ibid.

(*r*) The Case of the Isle of Ely, 10 Rep. 141 ; S. P., Cro. Jac. 336 ; 2 Bulst. 198.

(*s*) Mo. 825, Nov. 8, 1616.

(*t*) 7 Ad. & El. 277.

(*u*) Sty. 179.

observations were renewed on a subsequent day. On the other side, it was argued that the tax ought to have been laid distributively; but Roll, C. J., said, that the prescription was waived, because it appeared that there had not been an inevitable breach, and then the matter must be decided at common law, independently of the custom; in which case the tax must be equal. By Roll, C. J.: The tax ought to be laid upon the number of acres, and here it is laid upon the persons of the inhabitants. Therefore, let there be a new tax (*x*). In this case, therefore, a special custom was laid, and, as a custom, was approved of by the Court, but it failed in the proof. "By that" [the number of acres], says the editor of *Callis on Sewers*, ed. 1685, "I conceive he means, that, in the taxation of every man, 'the acres ought to be set down in respect of which he is taxed' (*y*). Nevertheless, the value of every acre need not be inquired into (*z*). From whence it may be gathered, that such a tax cannot be levied on a township, unless by special custom; and, possibly, in the case cited from 37 Ass., there might have been such a custom, although Mr. Sergeant Callis says, that "it doth not appear that the townships there rated were so taxed by any custom, but merely by the law of the land" (*a*).

Again, in a case, where a sewers rate was assessed in gross upon a township at large, it was held bad, though laid only for defraying the expenses of the commission, and although there had been previous assessments in like manner, which had been submitted to (*b*).

But now, by stat. 4 & 5 Vict. c. 45, a tax for contingent expenses may be made upon a place in gross, and may be called "The General Sewers Tax." The first section recites the statutes of sewers,* and enacts, That any court of sewers may, for the purpose of making recompenses to clerks and others employed by the Court, and to witnesses, and for the expenses

(*x*) *Custodes, &c. v. The Inhabitants of Outwell*, Tyd. Newton, &c., Sty. 178, 185.

(*y*) *Callis*, 128, n. (*a*). And see 9 Mod. 95, by Parker, Lord Chancellor.

(*z*) *Commissioners of Sewers v. Newburg*, 3 Keb. 827.

(*a*) *Callis*, 128. See *Rex v. Whittaker and others*, 9 B. & C. 648.

(*b*) *Emmerson v. Saltmarsh and others*, 7 Ad. & El. 266, 275; 2 Nev. & P. 446; 1 Jur. 476. *Secus*, as to an amercement, *post*.

* 23 Hen. 8, c. 5; 13 Eliz. c. 9; 3 & 4 Will. 4, c. 22.

of surveying, measuring, planning, and valuing any lands, or the making, collecting, and expending certain taxes, rates, and scots to be raised under the recited acts, or hearing of objections to such taxes, &c., or carrying out any litigation or controversy connected with the duties of sewers, and for the payment of all other necessary charges of sewers, and the contingent expenses of working the commissions (*c*), but for no other purposes; tax in the gross in each parish, township, or place, such lands, &c., as have been or shall be within the jurisdiction of the Court, yet so that such lands, &c., shall contribute thereto in proportion to the benefit and advantage received or capable to be received from the said Court, as compared with the lands, &c., of the other parishes, &c., within such jurisdiction, which said tax shall be denominated "The General Sewers Tax," and shall be recoverable by distress and sale in like manner as any fine or americiament imposed on a parish or township by a Court of Sewers is now by law recoverable; but no distress for such general sewers tax shall be replevied by any sheriff, &c., or Court of Law or Equity whatsoever. Under this act the *bonâ fide* expenses of resisting an act of Parliament, which had the appearance of threatening an injury to a particular level, were held to be the subjects of a rate by the commissioners. So that where they had instructed their clerk to make an opposition, his representatives were held to be entitled to a mandamus for a rate under the statute to defray the costs and expenses due to the deceased (*d*).

Then, by sect. 2, any Court of Sewers may authorize and direct any surveyor or other person to apportion such general tax among the occupiers of such lands, &c., in each such parish, &c., in just proportions. And, when so apportioned, such tax shall be collected by some person appointed by the Court for that purpose, and shall be by such person paid over to the treasurer of or other person appointed by the commissioners of sewers at such time as the Court of Sewers shall direct. Provided that every occupier upon whom such general sewers rate shall be apportioned shall have notice in writing of

(*c*) See 3 & 4 Will. 4, c. 22, s. 16.

(*d*) *R. v. Commissioners of Sewers for Norfolk*, 20 L. J., Q. B. 121; 15 L. J., Q. B. 549.

such apportionment ten days at the least before the next Court of Sewers for the limit in which the lands, &c., lie.

By sect. 3, if no complaint be made against the tax at the Court of Sewers, held next after the expiration of ten days after such notice of apportionment made as aforesaid, such rate shall be final. Still, in case of any complaint of inequality or non-liability to pay the rate or apportionment, the commissioners shall, at such Court, or some adjournment thereof, or at some subsequent Court, proceed to investigate the same, by the examination of such witnesses as the parties interested therein shall produce, or by the examination of such other witnesses as to the said Court shall seem right; and the decision of such Court shall be final. And such apportioned rate shall be recoverable by distress and sale of the effects of the persons rated by warrant under the hands and seals of six commissioners, and the distress shall be irrepleviable. Nevertheless, the Court of Sewers may direct any feigned issue, appeal or action at law to try any dispute as to the inequality or non-liability of any person to pay the tax or the apportionment, the person objecting having first given security to the said Court for the payment of all costs and charges attendant thereon (*e*).

Repairs.
When made
by the level.

It might seem to follow, as a corollary from the above position respecting the liabilities of particular persons and bodies, that the level, or the public at large, would be always liable, as a matter of course, when the individual or particular body were exempt in their single capacity; and again, that when the particular liability occurred, the level could not be called upon to contribute, or to repair. This conclusion, however, cannot be drawn; the first proposition is true, but the latter is by no means necessarily so; and we must therefore proceed to explain how it is that the public may occasionally be called upon, although an obligation be immemorially, or otherwise, upon other parties.

True it is that the level becomes chargeable, where no one appears liable to the burthen, by tenure, prescription, custom

(*e*) See *post*, Chap. III.

or covenant (*f*); but many circumstances may happen which will alter the condition of the public, even though one be liable by such tenure, &c. As, if through the neglect of the particular individuals, the lands which these last were bound to sustain become surrounded by the sea, so that the public welfare be endangered; or if such lands be overflowed and lost, through the violence of the waves (*g*). So it is if the tenure itself be extinguished, as by escheat (*h*). So again, supposing the country to be in obvious and imminent hazard, although no actual mischief have occurred, the commissioners are not to wait for the tardy or inefficient exertions of the party bound by tenure, &c., but are under an obligation to act immediately, in order that the neighbourhood may not be surrounded by the water (*i*). And here the owner, or person bound, may or may not be in fault, according to the circumstances of each case; for if the threatened mischief be great, and that in all likelihood he may not be able to repair the damage sufficiently, the level is to supply the emergency, and the owner will not be answerable for more than his share;* for which, indeed, he would be, in case he were in default, although it might not be worth while, in general, for the commissioners to proceed against such a person.

Keighley's case (*k*) is a well-known authority to show, that in case of a sudden and unusual increase of water, the level will be liable, provided there be no default in the party; "for things which happen extraordinarily by the sea or great waters, which neither policy of man could prevent, nor industry or force could resist, are counted inevitable and indefensible" (*l*). Therefore, if there be a great tempest, or other violent convulsion, and the party liable have not been guilty of any default, the level will be liable; and even in case of default, as we have said, the commissioners are not to delay supinely, until the damage

(*f*) Callis, 145; 7 Com. Dig. 346.

(*g*) Ibid.

(*h*) Ibid.

(*i*) Ibid.

* As, if one held by tenure, at the yearly payment of ten shillings; should this sum be insufficient to do the repair, the remainder must be charged upon the level. (Callis, 148.)

(*k*) 5 Rep. 139. And see *post*, in this Chapter.

(*l*) Callis, 146.

be inflicted, but they must enforce or perform the repairs, and charge the party or the public with the expenses, on the principle above stated, namely, that where the individual has been to blame he must pay, and where not, the public must contribute; or they may tax the level, in case of the party's default; and every one of the level may have an action against the defaulter (*m*). This observation may serve to reconcile any seeming contradiction in the case which we are now about to cite. In the case of Keighley above referred to, the Court of Common Pleas resolved, that if one be bound by prescription to keep a wall in good repair, and then, through some unaccustomed deluge of water, the defence be broken, the tax should be upon the level. They said, that the statute of Hen. 8 would bear this construction, namely, that a person under a prescriptive obligation, or otherwise, ought certainly to repair; but that in case of his inability, or of inevitable necessity, it ought to be repaired by others, to prevent mischief (*n*). If the party bound be in default, he only ought to be charged; but if the danger become imminent, the level may be charged, and the defaulter becomes liable to the public. And a case from the Year Books was mentioned (*o*), where an action was brought against the defendant, because he had not repaired a certain wall, in contravention of an immemorial obligation to do so; whereupon the water entered, and drowned the plaintiff's land. The defendant traversed this prescription, and the jury found for the plaintiff, and that there was a defect in the wall; upon which the plaintiff recovered his damages; and there went a writ from the sheriff to distrain the defendant to repair the wall (*p*).

And, moreover, in the above-mentioned case the relations of lessor and lessee were touched upon; and we may remember, that in a decision lately cited at some length, where the executor was held liable, the Court held, that commissioners of sewers could enforce a covenant by a lessee to repair generally. Therefore, although in cases where the lessee enters into an express

(*m*) 10 Rep. 139 (*b*).

(*n*) S. P., by Walmsley, J., 5 Rep. 100.

(*o*) 18 Edw. 3, c. 23.

(*p*) Keighley's case, 10 Rep. 139. And see Sty. 179.

covenant to repair, he is not liable to the penalty without any default of his own upon extraordinary emergencies, as where a house is burnt by lightning, a fire, or overthrown by the winds, or the rage of the sea, &c. (q), yet where such a covenant exists, the lessee remains under the obligation, notwithstanding these sudden and remarkable events. And thus a difference is observable between prescription and a deed; in the former case, as we have seen, a party, uncontaminated by default, may be relieved, to some extent, from his responsibility, whereas in the latter, supposing the existence of an express covenant to repair, he cannot so shelter himself. The two authorities which we next cite establish the distinction between default and due caution in a very convincing degree. A rule had been obtained, calling on the commissioners of sewers for Somerset to show cause why a *certiorari* should not issue to remove their orders for the erecting a new sea-wall in Huntspill. They had directed this new defence to be made, and had ordered a rate throughout the level. It appeared, that a sea-wall had stood from time immemorial on the spot in question, that the level had never been rated to the repairs of this old sea-wall, but that the owners and occupiers of certain lands within the level had always done repairs, and had rebuilt, as occasion required, and that a storm had, in the course of the preceding winter, destroyed the old sea-wall. It further appeared, that, about seven years since this overthrow took place, the sea suddenly and unavoidably broke through a neck of land on the western side of the river Parrett, that its inroads had been gradually increasing, and that, upon the occasion alluded to, a most violent storm arose, accompanied by an extraordinary tide, by which the sea was driven through the new channel directly against the sea-wall, with much greater violence than if the new channel had not been formed. It is material to add, also, that the wall in question was in *more complete repair at the time of this flood* than formerly. The consequence of this assault by the sea was the demolition of the wall. It was then stated, that the damage done, as well as the formation of the new channel, were inevitable; that the persons who had been

(q) In this case the lessee was only relieved from the penalty; he was held bound to do repairs as soon as possible, because of his express covenant; Dy. 33 (a); 10 Rep. 139 (b); Mo. 62; Griffith's case, Mo. 68; Id. 73, per Dyer, C. J., and Welch, J.; Co. Litt. 53; and see 2 Inst. 305.

accustomed to keep the wall in repair, could not have prevented the accident, and, consequently, that no default or neglect could be charged upon them. New works had been constructed to meet this difficulty, and the price for rebuilding the defence was estimated at thirty times as much as would have been necessary to have restored the old wall. Upon a due statement and review of these facts, and of the authorities above referred to, the counsel in support of the rule declared fairly, that he could not resist the decisions; and Lord Kenyon, concurring in this course, observed, that it had been frequently said, that no *certiorari* ought to be granted to remove a prior rate, lest the poor should starve in the mean time; and that there was almost as strong a reason against removing such an order as the present, lest in the mean time the whole county be inundated (*r*). Here there was no default, but the damage arose from inevitable accident.

The facts in the next case substantiate the difference above mentioned. A mandamus had been applied for and obtained, commanding certain commissioners of sewers to reimburse one A. H., a sum expended by him in the repair of a sea-wall next adjoining his lands. It appeared, that A. H. was an owner and occupier of land in the level, that all lands in the level derived benefit from the sea-wall, but that the commissioners of sewers had always assessed the owners of lands to the repair of so much of the sea-wall as abutted on their respective lands. An extraordinary high spring tide, accompanied by a violent tempest, did such damage to A. H.'s wall, as to raise apprehensions that the greater part of the level would be flooded. The wall was sworn to have been at the time of the accident in a usual and fair state of repair, as good as for eight years preceding, and such as would have resisted the ordinary flux and reflux of the waters. The marsh bailiff ordered A. H. to repair the wall soon after the storm, which he did at a great expense, and then memorialized the

(*r*) *The King v. The Commissioners of Sewers for the Western Division of the County of Somerset*, 8 T. R. 312. In *Henley v. The Mayor of Lyme, Best*, C. J., cited a case to the same effect, tried before him at Gloucester, where the jury found, that certain mounds had been kept in good repair, and that a particular loss which had happened was the result of a high tide, which had never before been experienced in those parts. (5 Bing. 113.)

commissioners for a reimbursement, which memorial, after consideration,* they dismissed.

Affidavits on the part of the commissioners were put in, showing, that various orders had been made from time to time that A. H. should repair the wall, but that he had neglected to do so, and that had he fulfilled those directions, no damage would in all likelihood have accrued from the spring tide and high wind; and that the partial damage which arose, was occasioned by the imperfect state of repair in which the wall had been generally allowed to remain; and, moreover, that the sea-wall of A. H.'s land, within the level, had always, during the memory of living witnesses, been maintained at the sole costs and charges of the several owners and occupiers for the time being of the said lands.

The counsel for the commissioners relied upon the distinction as established by the authorities, and said, that the opinion of Walmesley, J., in 5 Co. (s), namely, that the commissioners ought not to charge a party, liable by prescription to repair a river-bank, with the whole of the expense, but that the whole level ought to be taxed, was explained, by taking this difference. The counsel in support of the mandamus endeavoured to open the general question, whether a party, bound to repair under the circumstances, might not call upon his neighbours for contribution; for it was sworn, that A. H., although possessed of only one-eleventh part of the lands, was obliged to support one-sixth part of the sea-wall of the whole level.* The Court, however, said, that it was too late to discuss that matter. They said, that if the question of default were doubtful in the case before them, they would grant the mandamus, but here the repairs required by the sewers' jury had not been done; and it had been, moreover, sworn, that in the event of such repairs having been completed, the mischief would, in all human probability, have been averted. It was impossible to say but that A. H. was in fault, and the rule was discharged with costs, the

(s) 5 Rep. 100, *ante*, p. 100.

* But it also appeared, that the marketable value of estates within the land was greatly influenced by the state of the sea-wall, which the owners were bound to repair. (1 B. & C. 479.)

motion having been made against a public body (*t*). Again, if there be a prescriptive obligation to repair, the question for the jury will be, not whether the sea-wall was competent to resist ordinary floods, but whether the owner was bound to provide against extraordinary deluges (*u*).

New walls,
&c.

Another occasion upon which the original proprietors are discharged from their *prescriptive* liabilities, is where the old wall has been destroyed, and a new one erected in its room. In such a case, the commissioners must lay the charge upon the whole level, as well in respect of the building as of the maintaining of the new defence, for no one can be bound by prescription, custom or tenure, to such repairs (*x*). A case in *Keble*, unexplained, seems to militate against this doctrine. There was a motion for a *certiorari* to remove an order of sewers, because the plaintiff had been charged alone to the repair of a new sea-wall, and the Court held this ill, because the same persons were chargeable to the new wall who should have repaired the old; but an affidavit was required from the plaintiff, that there was no danger in the state of the wall, or that it was in repair (*y*). The point in this case does not seem very clear; it might have been that the level originally had repaired the old wall, or that those who had so repaired were under an obligation to do so by *covenant*; and in either of these not improbable events, the decision is not irreconcilable with the general principle, nor with prior authorities.

There may, however, be a liability to repair *ratione tenuræ* although damage be occasioned by a tempest, without default. It seems that such a liability is only limited by the ability of the party, or the value of the lands granted (*z*).

Let us endeavour to ascertain the principle which arises from

(*t*) *The King v. The Commissioners of Sewers for Essex*, 1 B. & C. 477.

(*u*) *R. v. Leigh*, 10 Ad. & El. 398.

(*x*) *Callis*, 148.

(*y*) *The King and Day v. The Commissioners of Sewers*, 2 Keb. 129.

(*z*) *R. v. Leigh*, 10 Ad. & El. 398; 2 Per. & D. 357. Minutes of the Court of Sewers, commencing seventy years back, containing orders upon the holders of the estate to repair the wall in question, were held admissible in evidence, although it did not appear that such orders had ever been acted upon.

the cases and observations above mentioned, respecting these *new* defences. It is clear, then, that to make a party chargeable for a new wall, independently of the public, he or his ancestors must have entered into an obligation so to do, and in case of the heir, he must have been expressly named, and have received a sufficiency of assets by descent; and thus it is, that *modus et conventio vinciunt legem*, and so it was held in the case of the executor above cited (*a*). But, on the other hand, where the individual is bound by tenure, or prescription only, he becomes released from his sole and several charge by the erection of a new defence (that is to say, a defence of a different description, or of a larger dimension); for the immemorial liability, like other matters which depend upon a usage beyond time of memory, becomes extinguished by the alteration.

These points regarding individual and other liabilities, not of an universal character, being settled, we come to speak of the responsibility of the level, or public generally, it being quite certain, that if no one be answerable in particular, the level decidedly lie under that obligation. And here the question of particular exemptions, which have been often claimed, but seldom with success, presents itself to us. It has been contended, that the king's lands are not liable to this tax for repairs, notwithstanding the express words of the statute. It had, however, been received for law, during many years, that they were so liable, and Callis expressly affirms that to be the law (*b*). And so it was objected to a distress made by commissioners of sewers, that eight hundred acres of the king's lands had not been assessed, and the Court held it a good exception, observing, that the king's lands were taxable by the statute (*c*).

Repairs by
the level or
public.

The question was, however, submitted to the Court of King's Bench a short time since. Trespass had been brought for taking the plaintiff's goods, and a verdict was found in his favour, subject to a case. The goods appeared to have been taken as a distress for non-payment of a rate made by certain

(*a*) *Ante*, in this Chapter.

(*b*) Callis, 131; 7 Com. Dig. 346.

(*c*) *Whitley v. Fawsett*, Sty. 12.

commissioners of sewers. The assessment was in respect of a messuage, or tenement, in the king's dock-yard in Deptford. The plaintiff was clerk of the survey in the dock-yard, and paid no rent for the house; but he resided there, and was removable at pleasure. The dock-yard appeared to have been principally drained by sewers, made and maintained at the expense of the Crown; but the plaintiff's house, in common with the rest of the dock-yard, derived a benefit from the public sewers, which were under the direction and management of the commissioners. The authority of the commissioners within that district was founded upon certain local acts, by virtue of which they made the charge objected to.

It was urged generally for the plaintiff, that the possessors of the houses were not liable to rates; that the king was not to be barred by a right or privilege by general words in an act of Parliament; that the statute of Edw. 6 restrained the former statute of Hen. 8 to lands in possession of the king's tenants, *yielding a profit*; that the mode of levying rates upon defaulters was by distress, and that lands in the possession of the Crown were not amenable to that process; that the sewers rate being imposed on the tenant by the local act, with a provision for reimbursement by the landlord, could not apply to the king, inasmuch as he was not expressly named. On the other hand, it was said, that this property yielded a profit because the occupier of the house gave his services in lieu of rent; that by the statute of Hen. 8 the Crown lands were expressly bound, and that the statute of Edw. 6 did not restrain the former act, since it provided only for particular cases of lands of the king, whose tenants paid rent, leaving all other cases as they stood before. The Court gave judgment for the defendant. The statute of Hen. 8 was made to remedy a great public inconvenience, and to introduce a great public benefit. By the ninth section, the lands of the king were expressly bound. Then, in order to remove any doubt as to the levy and distress upon Crown lands, the statute of Edw. 6 makes those lands liable to be distrained upon; that was certainly a general legislative direction, that a distress for those rates might be taken upon the lands of the king. The subsequent clause did not restrain the general words there mentioned as prescribing the distress, so

as to confine that power to such lands only as were in the possession of the king's tenants. Judgment of nonsuit was accordingly given (*d*).

But a distress cannot be levied for sewers rates within the precincts of a Royal Palace occupied as the residence of the sovereign. Kensington Palace comes within that description (*e*).

Apartments in Somerset House have been held liable (*f*). For by 52 Geo. 3, c. xlviii, s. 7, all persons are liable to the sewers rate under that act as occupiers of premises rateable thereto, who are *de facto* rated in respect of such premises to the poor rates of the parishes to which that act applies (*g*).

So again, ecclesiastical persons cannot claim an exemption from the tax in respect of their glebe lands, or their meadow and pasture land, for these are not so sacred as tithes, having been conferred upon the clergy by the benevolent gifts of laymen, and so the burthen which was imposed upon the lay donor remains (*h*).

Ecclesiastical persons.

So lords of manors are taxable for their quit-rents, and rents of assize (*i*). Though if the rents be so small as that they are scarcely worth the collecting, the commissioners, it is said, may spare them upon the principle, *de minimis non curat lex* (*k*). But they are not chargeable for the freehold of their copyholds; for the seisin is but in imagination and construction of law, since the copyholder is the receiver of the visible and substantial profits (*l*).

Lords of manors.

Therefore a copyholder cannot claim an exemption from this charge (*m*), and we shall see by and by, that by virtue of a particular enactment, a copyholder may lose his land for non-

Copyholder.

(*d*) *Netherton v. Ward*, 3 B. & A. 21.

(*e*) *Attorney-General v. Donaldson*, 10 Mees. & W. 117.

(*f*) *Soady v. Wilson*, 3 Ad. & El. 248; 4 Nev. & M. 777.

(*g*) S. C.

(*h*) *Callis*, 131; 7 Com. Dig. 346.

(*i*) 7 Com. Dig. 346; *Callis*, 139.

(*k*) *Callis*, 140.

(*l*) *Id.* 133; 7 Com. Dig. 347.

(*m*) *Id.* 132—136; 7 Com. Dig. 346.

payment (*n*). Again, a commoner is liable to be charged, that is to say, he who has a common of piscary, turbary, or pasture in great fens, marshes, and wastes; but a common, after the corn is severed, cannot, it seems, be charged, as being of small value (*o*). But one who has the vesture, or herbage of lands, as their *prima tonsura*, is liable (*p*).

Ferry.

Again, one who has a ferry may be charged (*q*); and so, again, may a person who enjoys a free passage for his boats upon a river, although this last class of contributors must be understood to mean such as have free and customary passage, as a liberty and inheritance, and not poor boatmen, who come thither accidentally by the general custom of the realm (*r*).

Custom to
be exempt.

Moreover, it seems, that it is incompetent in general to plead a custom, or prescription, to be exempted, although, according to Mr. Sergeant Callis, such a relief may be claimed by special custom. And the learned writer cites a case in confirmation of this, where a custom in Lincolnshire was alleged to be freed from the repairs of the sea-banks, by reason of some other repairs which the proprietor and his ancestors had done, and which he was wont to do for the benefit of the public. This custom was stated to exist in the town and manor of Mablethorp (*s*). But, ordinarily, the Sergeant observes, there cannot be such a claim of exemption (*t*).

Reversioners.

In respect, however, that the beneficial occupier is usually assessed in the first instance, however he may be entitled to demand reimbursement from his landlord in the absence of a covenant, on his part, to pay the tax—it follows, that the lessor, or reversioner, is not commonly liable in his own capacity to the immediate assessment, that is to say, not to the usual charges. But where extraordinary repairs are required for the benefit of the inheritance the case is different, as if a new wall, &c., be

(*n*) *Post*, Chap. III.

(*o*) Callis, 137; 7 Com. Dig. 346, 347.

(*p*) Callis, 137.

(*q*) *Ibid*.

(*r*) *Ibid*.; 7 Com. Dig. 346.

(*s*) Sir George Fitzwilliam's case, Callis, 223.

(*t*) *Ibid*.; 7 Com. Dig. 346.

erected, or if the ancient defences be materially decayed. These last reparations are not of an ordinary and annual nature, but continue permanent for the benefit of the lessor, or of him in reversion, whereas the other sort of repairs would probably expire during the term of the lease; therefore the landlord is chargeable for the extraordinary improvements, and the tenant for those which are common and frequent (*u*).

And although Sir Robert Heath observed upon one occasion, that commissioners of sewers may charge the lessor or lessee at their discretion, though it were for a new defence (*x*); yet this opinion, with regard to the charge of new defences, stands well, if it be judged by the difference above pointed out. And, at the present day, as the lessee most usually covenants to pay all sewers rates, it becomes more convenient for the commissioners to resort to the lessee, who is in possession of the land, in the first instance, and who, if he have an objection to sustain the charge, may, under the statute, require reimbursement from his landlord. But a remainder, or a reversion expectant after an estate tail, is not chargeable; but the burthen falls solely upon the lessee in tail in possession, and not upon “dry and fruitless remainders,” for it is more to be feared that tenant in tail will cut off the remainder and reversion by a recovery, than that the sea shall drown his estate by an overflow (*y*).

According to the above principle, a mortgagor shall not be taxed by reason of his equity of redemption, nor he who has a title by land by entry, &c., or who has a contingent use, nor a bargainee of land before enrolment (*z*). Nor, again, the owner of an advowson, whether he be the patron or the founder, for this property, though a tenement in law, does not yield any immediate profit (*a*). Nor, moreover, are such as have proxies, synods, &c., liable, although of an annual value (*b*), nor persons

Mortgagor,
&c.

(*u*) Callis, 140—144; 7 Com. Dig. 346.

(*x*) Mar. 198.

(*y*) Callis, 140; 7 Com. Dig. 347. Two tenants in common may be assessed according to their proportions (Callis, 210), and the tax shall not be doubled. (Id. 212.)

(*z*) Callis, 139; 7 Com. Dig. 347.

(*a*) Callis, 139.

(*b*) Id. 138; 7 Com. Dig. 347.

who have the use of fairs, markets, &c., provided they receive but a casual profit (*c*). Although the proprietor of a market, who draws an annual rental from the use of it, might, it seems, be taxed by the commissioners at their discretion.

Offices, &c. So, again, offices, as a town clerkship, the clerkship of a market, &c., though confined to a place within the level, are not liable to this assessment (*d*).

So, the clerk of works at Chelsea Hospital was held not liable, and the sewers rate made upon him was held void; and it was considered no estoppel that the commissioners of the Hospital had traversed the presentment, and had a verdict against them before a jury of sewers (*e*). Nor is the Westminster Bridewell, occupied by prisoners only, liable; the house of the governor being separately assessed to the rate (*f*).

Annuitants. Annuitants, further, are not chargeable, unless occasionally under the statute of 43 Eliz. (*g*), for the tax relates to land, and the annuity is payable to the person (*h*). And the law is the same, though a corporation seised of lands be the grantors of the annuity, for they are chargeable in respect of their possessions (*i*).

What lands, &c. The persons who are, or are not chargeable, have thus been mentioned at some length, and we proceed just to notice shortly, the nature of property assessable, which, however, to a certain extent, has been already done. And it may be remarked, that *lands* in general constitute the property chargeable; but the statute mentions lands or tenements, or common of pasture, or profit of fishing, and the word *tenement* being, as is well known, of larger import than lands, containing all that the word "lands" has, together with all things else which lie in tenure (*k*), many other kinds of property, for instance, ferries, liberties of free

(*c*) Callis, 138; 7 Com. Dig. 347.

(*d*) Ibid.

(*e*) *Neave v. Wrather*, 3 Q. B. 984; 3 Gale & D. 221.

(*f*) *Tracey v. Taylor*, 3 Q. B. 966; 3 Gale & D. 14.

(*g*) See *post*, Chap. III.

(*h*) Callis, 136; 7 Com. Dig. 347.

(*i*) Callis, 136.

(*k*) Id. 139.

passage, &c., are taxable, as we have above stated. Thus also meadows, marshes, mills, woods, &c., are included (*l*). And so, again, are parks and warrens (*m*) within the level; but Mr. Sergeant Callis inclines, that chases, as such, are not chargeable, because deer, which are *feræ naturæ*, are not bound to certain precincts; but he adds, that as lands, such chases may be assessed (*n*).

Some discussion has taken place as to the liability of the owner of tithes (*o*); and it may be observed, that where such tithes were in the hands of a layman, they might be rated upon these commissions, but they could not be assessed in the hands of a spiritual person without a custom expressly for that purpose. And although this description of property was certainly liable to many imposts, yet it will be found on examination, that particular acts of Parliament create the charge upon those occasions, as, for example, the 43 Eliz. c. 2, made the tithe owner liable to the poor rate (*p*). And so, likewise, although spiritual corporations, and other individuals, have been charged at various times to the repair of bridges, &c., yet custom, prescription, or tenure, seem to have governed their responsibilities (*q*); and thus the general principle is substantiated, namely, that, unless there were a direct affirmative custom in favour of the taxation, the clergy could not be rated to the sewers rate in respect of their tithes.

And now, by 6 & 7 Will. 4, c. 71, s. 69, every rent-charge payable instead of tithes (tithes being abolished by that act), shall be subject to all parliamentary, parochial, and county and other rates, charges, and assessments, in like manner as the tithes commuted for such rent-charge have heretofore been subject. The question seems to be, whether a sewers tax or assessment can be included under the words "other rates," &c.; for if not, as a sewers rate is not a parliamentary rate (*r*), nor a

(*l*) 7 Com. Dig. 346; Callis, 139.

(*m*) *Ibid*.

(*n*) 7 Com. Dig. 138.

(*o*) See Callis, 129—132.

(*p*) See the note to Callis, 132.

(*q*) Callis, 131.

(*r*) *Palmer v. Earith*, 14 L. J., Ex. 256.

parochial nor county rate, the owner of the rent-charge would not be liable. It would appear, however, that the word "other," upon this occasion, may be said to embrace rates independent of all those which are particularly mentioned, and that the word cannot be limited in its application. And if this be so, the owner of the rent-charge will stand in the position of the ancient tithe owner, as to the sewers rate and tax, and will be governed by the rules of law which we have above set forth.

But some lands are not liable; for instance, mountainous, or high lands, which cannot be surrounded, are in general exempt (*s*); and we have before seen, that these do not come within the survey of the commissioners (*t*).

Nevertheless, these high lands shall contribute to repairs for the benefit of the country in general, although they be not liable to damage from the waters; and the principle is, that which we have so often found consistent, namely, that those who derive benefit must contribute to its source. Therefore, it is said, that upland countries may be assessed towards the repair of ports or havens; for the owners of those lands, being made partakers of marine commodities, derive necessarily a profit from the maintenance of those public conveniences, and, therefore, the extraordinary repairs of those ports are not confined to the level, but may be levied upon the country at large (*u*). This is the strict interpretation of the law, for a general tax of this nature *eo nomine* is not of common occurrence; nevertheless, as sums are frequently voted by Parliament for the maintenance of public works, and, moreover, as private individuals have, at different seasons, obtained charters, with many privileges for their enterprising execution of public improvements for the advancement of commerce, the country is indirectly taxed for these repairs, and thus the position of the learned Sergeant is illustrated and established.

Goods.

But even goods and chattels are not always exempt from these assessments. The statute 43 Eliz. c. 4, which was an act to redress the misemployment of lands, goods, &c., given to

(*s*) 7 Com. Dig. 347; Callis, 136, 223.

(*t*) *Ante*, in this Chapter.

(*u*) Callis, 148; 7 Com. Dig. 346.

certain charitable uses, contains in its preamble these words, "ports, havens, causeways, sea-banks:" being some of the subjects to which the lands and goods in question were devoted by way of charitable use; and thence it is, that if goods and chattels, or annuities, be given to these uses, they may come under the cognizance of commissioners of sewers, who may make an assessment upon them by virtue of the laws of sewers. And thence it is said, that if lands or *chattels* be given for the reparation of a sea-wall, the commissioners acquire a jurisdiction over such, and may meddle with them (*x*). And tithes, when in the hands of a layman, become mere chattels, according to the saying, *Tunc res spirituales fiunt temporales, et transeunt decimæ in catalla* (*y*).

To proceed: the consideration of the duration of this tax is deserving of attention, it being a matter of some importance, whether the assessment continue to be the same in perpetuity or not. It has been held, says Mr. Sergeant Callis, that the commissioners of sewers cannot bind any man's inheritance to a perpetual charge by any power or authority given under this statute (of Hen. 8) (*z*); and Lord Chief Baron Comyns says, accordingly, that such a perpetual tax cannot be imposed, unless it be warranted by a special custom, and then a perpetual decree may be made (*a*). And the learned writer on sewers agrees, that there may be the custom of a town or county to repair each his own particular portion perpetually (*b*); nevertheless, inasmuch as by the customs of Romney Marsh, such a charge ought to be perpetually imposed, and as the commissioners of sewers were empowered under the statute to make laws and ordinances in imitation of those of Romney Marsh, the sergeant seems of opinion, that such a perpetual charge may be made (*c*). And he adds, that upon decrees for sale of land, it is usual in those decrees to bind those lands to perpetual repairs (*d*).

Perpetual
charge upon
lands, &c.

We have thus mentioned the persons who are liable to be assessed by commissioners of sewers, whether they be solely

(*x*) Mar. 200, by Brampston, C. J., and said to have been so adjudged.

(*y*) Callis, 131.

(*z*) Id. 201.

(*a*) 7 Com. Dig. 346, 347.

(*b*) Callis, 201.

(*c*) Id. 292.

(*d*) Ibid.

answerable in their own persons respectively, or jointly with others, preserving still a responsibility separate from that of the public; or again, whether they be answerable in respect of their condition as part of the level, that is, of people inhabiting lands exposed to the damage of sudden floods; or lastly, as part of the community at large. We have seen that lands, and sometimes chattels, are within the jurisdiction of the commissioners, and the different properties enjoyed in respect of lands have also been noticed with reference to this tax. It follows, therefore, that when no claim upon private persons exists, when no exemption can be pleaded, the whole district receiving benefit from the assessment must be fairly, equally, and impartially burthened with the necessary expenses of repairs or improvements. However, as we have sometimes used the word "level," sometimes "district," and sometimes "the people at large," it is desirable to explain here, that each of these terms has been used synonymously for "the public," since although there may be, and frequently are, several subdivisions upon the same level, yet where the tax is laid generally upon any one of these subdivisions, it is an universal assessment as far as that separate portion of the level is concerned, and may thus be said to be imposed on the public. And we shall see presently, that commissioners have no power to alter the customary divisions of a level, so as to levy upon the whole of these divisions at one time, and to tax the different portions of it at another, for this might create a considerable injustice. A *certiorari* was moved for against the commissioners of sewers for the Tower Hamlets, for the purpose of removing a presentment made by a jury within their limits, and also a certain order for a rate over the whole of the hamlet founded on the above presentment. It appeared, that the commissioners had always acted under one commission for the whole district; that they always considered the district as containing six different levels or lines of large leading sewers; and that they had always acted upon the understanding that such was the case, each district being made liable to the repair of those sewers only from which it derived benefit. It further appeared, that separate presentments and rates had been made for these levels respectively, until 1821; and that, until then, they had been treated as distinct from each other; but that at that

period a desire was manifested, that one rate should be applied to the whole district, and steps were soon afterwards taken to effect that purpose. The inhabitants of Hackney, one of the six levels above mentioned, resisted the equalization of the rate and intermixture of the levels throughout the district, inasmuch as they derived no benefit from the sewers on the five other levels; and because, also, they had been accustomed to maintain their own sewers at a much less expense in proportion. And the Court, after much deliberation, made the rule for a *certiorari* absolute, holding that the rate had been improperly made. For the principle clearly was, that none except those who claimed benefit from sewers should be called on to contribute towards them; and the inhabitants of Hackney, in this case, had sworn that they gained no advantage whatever from the sewers on the other five levels. Then, the Court said, if it should be holden that the present rate was good, not only would the practice in the district in question, which had prevailed so long, be overturned, but all other rates made for distinct and separate levels, would thus be adjudged invalid, and rendered liable to be quashed. The Court then instanced some cases (*e*) in which commissioners of a large district had subdivided the lands within their own limits, and the rule was made absolute (*f*). Lord Tenterden finally made some observations on the meaning of the word "level," denying that it meant, as had been insinuated at the Bar, an artificial division of land, but, on the contrary, alleging its meaning to be the particular character and situation of the country (*g*). And this is quite different from a case where commissioners of sewers had united levels which were once separately assessed, and then made one uniform rate for the whole. This was held to be a correct proceeding, and within the statutes 23 Hen. 8, and 2 & 3 Will. & M. Sess. 2, c. 8. In *R. v. The Tower Hamlets Commissioners*, there was not even a junction between the sewers themselves (*h*).

(*e*) *Rooke's case*, 5 Rep. 99 (*b*); *Stafford v. Hamston*, 2 B. & B. 691; *Netherton v. Ward*, 3 B. & A. 21.

(*f*) *The King v. The Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517.

(*g*) *Id.* 524.

(*h*) *St. Katherine's Dock Company v. Higgs*, 14 L. J. 348; confirmed in error, 16 L. J., Q. B. 377; 10 Q. B. 641.

The authority of *Rooke's case* shall close this part of the subject, and it has been reserved until now by reason of the comprehensive law which it applies to general taxation in respect of sewers. One *Rooke* brought replevin against *Withers*, and the defendant justified under commissioners of sewers, because one *C.* was assessed to every acre for the repairing of a bank, for the nonpayment of which charge the distress was taken. The plaintiff replied *de injuria absque tali causâ*. The jury found the commission, and the stat. of Hen. 6, and Hen. 8, and that the commissioners had impanelled a jury to inquire of defaults, who presented that seven acres of meadow, in which the distress was taken, were next adjoining the river, and that the bank of the river adjoined the seven acres. The jury further found, that the occupiers of these seven acres had used always to repair those seven acres, sometimes voluntarily, sometimes by presentment. They further found, that there were eight hundred other acres in occupation within the same level, and subject to the inroads of the water in default of the bank, and the question was, whether these last lands should not have been taxed towards the repairs of the bank. It was held, first, that the finding of the repair by the occupiers was not material, because these occupiers might have been tenants at will, or other particular tenants, who could not bind the inheritance. And secondly, that the commissioners ought to have taxed *all* who were in danger of being damaged, and not him only whose lands adjoined the river, since the statute of Hen. 8 had expressly declared, that no person of any estate or condition should be spared. And judgment was, accordingly, given for the plaintiff (*i*). Here no one individual in particular was found to be under the obligation, and consequently the whole level was chargeable.

Having ascertained the persons who are to be assessed, we proceed to inquire as to what improvements or repairs the commissioners are empowered to effect, and also respecting the extent of their jurisdiction in those particulars.

And here it may be anticipated, that their authority may be

(i) *Rooke's case*, 5 Rep. 99(b); S. C., recognized 2 Ro. Rep. 289; S. P., recognized 4 Mod. 350.

exercised to compel all ordinary repairs of the different defences committed to their charge by the statute, that is to say, of walls, ditches, banks, gutters, sewers, goats, causeways, bridges, &c. And thus in a great case respecting Bracebridge, in Lincolnshire, the commissioners were holden justified in compelling the repair of it. It was found by inquisition, that the bridge above mentioned, standing on the river Wytham, thirty miles from the sea, was fallen into great decay, so that carts, &c., could not pass over it as had been the custom. The defaulters were declared to be Henry Sapcots, Esq., who, by reason of his manor of Bracebridge, was bound to repair a part; one B. G., who by reason of his house standing at the bridge foot, on the north side of the river, was bound to repair another part; the corporation of Lincoln, who were under an obligation to maintain a third or other part; and the county of Moreland, which had been accustomed to repair another part. The repairs were decreed against those persons and corporation accordingly. But a bill in the Exchequer Chamber was filed against the commissioners by Mr. Sapcots, to be relieved, and it was alleged, that this bridge stood far from the sea, and so that the sewers laws could not extend to it; but we are informed, that at the hearing of the cause, ann. 16 Jac. 1, he was overruled in that and all other parts of the suit (*k*).

By 24 & 25 Vict. c. 133, s. 59, the commissioners of sewers of one area may agree with the commissioners of an adjoining area that they may do works upon payment of certain sums, which may be leviable out of the rates as if the expenses had been incurred within their own area, and they may do the same in relation to any drainage board, or any drainage board may so act with respect to any other drainage board.

Exchange of
repairs.

It is not necessary to enlarge further upon this matter. During the enumeration, in a prior page, of those defences which lie within the survey of the commissioners, it appeared, in a great measure, how far the powers of those officers extended, in respect of particular objects; and it is clear, that the same law which gives them power to view, in order to repair and

New walls,
&c.

(*k*) Sapcots v. Sir Thomas Grantham and others, Callis, 90.

amend, concedes also the right of so repairing and amending. But the question of new defences and improvements has not been so fully discussed; and it remains to say something upon that point here. And first, it should be noticed, that notwithstanding the difficulties which so long prevailed upon this subject, the statute 3 & 4 Will. 4, c. 22, has in a great measure removed the doubts and obstacles alluded to (*l*). It is obvious that a great difference exists between building a new wall upon an ancient site, and erecting a new defence where there may not have been any one before. The former of these acts seems to be within the statute of Hen. 8, which has the words "make new;" but the latter proceeding was encumbered with doubt; and many arguments have been used for and against its validity (*m*). Indeed, we have already seen, that the rebuilding of an old wall in a new form is allowable, and that in many cases such a work will not even vary the liability of the original parties to repair, and that any little alteration for the public convenience is certainly within the reach of the commissioners. And so Callis says, that if it be fit to take an arch away from, or add a new one to a bridge, where none was before, it is most fit to be done by these commissioners (*n*). So, it was laid down by the Court, in the Isle of Ely case, that ancient walls, when broken down by the water, might be replaced by others, to defend the people and their lands within the same level, because the manner of defence by walling could not be called a new invention, but was the old way approved of by experience (*o*). But it was said at the same time, that nothing absolutely new could be introduced by the commissioners, such as an artificial mill, to cast out the water, &c.; for if such new inventions were profitable no owner of land would refuse to contribute, it being to his own advantage; and then the taxation would be by the voluntary consent of the individual, and not by constraint under the commission of sewers (*p*).

So again, at the Court at Whitehall, in 1616, where the Master of the Rolls and the Attorney-General were present, one

(*l*) See *post*.

(*m*) See, on the subject of new defences, Callis, 92--104.

(*n*) Callis, 89.

(*o*) 10 Rep. 142; 7 Com. Dig. 341.

(*p*) 10 Rep. 142.

of the objections was, that the commissioners of sewers had no authority to cause new banks, drains, or sluices, to be made where there had not been any before; and although the opinion of the council was contrary, yet it appears from hence, that such a notion had obtained with respect to new walls (*q*). So again, it was urged, on another case, that commissioners could not order the erection of a new wall; but a representation being made on the other side, that the erection proposed would not be wholly new, Roll, C. J., assented, observing, that the case of the Isle of Ely was for making a new wall totally, and thus the principle was recognized (*r*). And so far from the building of a defence entirely new, it was said, in the case from Coke above referred to, that if, by repairing the ancient wall, the damage and peril could have been averted, there was no necessity for making the old wall again *de novo* (*s*).

And Mr. Sergeant Callis, although of a different opinion upon this question, admits, nevertheless, that the words of the statute, literally taken, must mean such old fences as were before; and the taking this to be the construction, the power of making new walls where none had existed before would clearly be excluded (*t*). But the learned sergeant is, upon the whole, of opinion, that the commissioners may, upon great and urgent occasions, decree the making of new banks, new walls, goats, streams, sluices, and other necessary defences (*u*). In support of this position he cites the judgments of Popham, C. J., and Anderson, C. J., in a case concerning new goats, in Lincolnshire. There had been a great controversy in Lincolnshire concerning the building of new goats at Skirbeck and Langrate for the draining of the water out of the South Holland fens into Boston haven. Sir Edw. Dimock advocated the works, and the county of Kesteven opposed it. And the exception taken was, that commissioners of sewers could not, by the power of their commission, make a law for the erection of these new goats where none existed before. But the two chief justices just alluded to said, that these new goats might be made, if for the good and safety

(*q*) Mo. 825.

(*r*) Case of the vills of Newton and Tyd, Sty. 192.

(*s*) 10 Rep. 142.

(*t*) Callis, 93.

(*u*) Id. 103.

of the county; but they recommended caution to the commissioners in acting thus, and warned them against promoting any such works for the benefit of private individuals (*x*). The learned sergeant then mentions an order of council given at Whitehall, (which was in those days deemed of much higher authority than it would now be,) confirming the power of erecting new works. The dispute in question arose in the counties of Huntingdon, Cambridge and Northampton, concerning the making of new cuts and drains in the Isle of Ely, the doing of which had been assumed by the commissioners of sewers as within their jurisdiction. The master of the rolls* and the attorney-general† were present at the council, when the king's order was made in favour of the commissioners' power, upon this occasion. It had been denied that the commissioners could make new banks, drains or sluices, where none had been before; but their lordships thought that it neither consisted with law nor common sense, that in a cause of such great consequence the law could be so void of foresight as to restrain commissioners from making new works to restrain the prey of the waters, as well as to repair the old, in cases of necessity; and judgment was accordingly given for the commissioners, on this as well as three other points which had been submitted to the council board. And it was further understood, upon the consideration of the question, that Lord C. J. Popham had delivered his opinion in writing upon all these points, and that his decision had been in favour of the commissioners (*y*). Thence Callis draws his conclusion, that new works may certainly be made where necessity requires them, provided they be for the benefit of the community (*z*).

There might, therefore, be said to have been conflicting authorities or decisions upon this point. And perhaps it is not unworthy of attention, while considering the report of Lord Coke against the jurisdiction of commissioners, that the great Chief Justice ostensibly lost his seat in the King's Bench,

(*x*) Sir Edward Dimock's case, Callis, 97.

* Sir Julius Cæsar.

† Sir Francis Bacon.

(*y*) Callis, 98; Mo. 824.

(*z*) Callis, 103.

through his adherence to the opinion he had formed and acted upon in this matter. For, when the Lord Chancellor addressed Sir Henry Montague, upon his election to the prime seat in the King's Bench, then recently vacated by Lord Coke, he made use, amongst other remarks, of the following expressions:—"He" (Sir Edward Montague, Sir Henry's grandfather) "devised not any new construction of laws against commissioners and judges of sewers, nor to draw them into the danger of *præmunire*; and whilst they were in this Court disputing of tricks and moot points concerning taxes, and making new gutters or walls, to suffer a great part of the realm to be surrounded and overflowed; for the winds nor the sea could be stayed with such new constructions and moot points" (a). However, besides the authority of Lord Coke, there was a strong inclination towards the same opinion, by Lord C. J. Roll, above cited; and we are told, that even Sir John Popham himself did not venture to compel any contribution towards the making of a *new river*, which he had begun at his own expense, but brought a bill into Parliament for the purpose; and this, although the ostensible object in making the river seemed to have been the public good (b). The bill, however, failed; and it must be admitted that there is a considerable distinction between a new wall, or sewer, and a new river. All these observations are also to be found in the Digest of Chief Baron Comyns, who does not impugn the cases in Callis, but, on the contrary, seems to entertain the same distinction between building a new wall on an ancient site, and erecting one entirely new, which we have above adverted to (c).

Upon the whole, it may be said, that very considerable doubts, as we have intimated in a former part of this chapter, were entertained for many years upon this subject, and to an extent so serious, that the act of William and Mary, already referred to, was passed in order to quiet all apprehensions upon the subject; thereby including new sewers then made in London,

(a) Mo. 828.

(b) 10 Rep. 142 (b).

(c) 7 Com. Dig. 341, 342. In p. 242 are these words, "Nor new drains, banks or sluices." (Mo. 825.) But whatever might have been the opinion of the Lord Chief Baron, there seems to be some mistake in citing this from Moor, because the making of these new drains was one of the difficulties urged against the commissioners of sewers at the council table; and their lordships expressly overruled that objection. See Mo. 824, &c.

Westminster, and other places there mentioned, within the jurisdiction of sewers, and enabling commissioners at the same time to make new sewers when and where they might see convenient (*d*).

And further, in the county of Glamorgan, where it had been found, that the sea sands had done considerable injury to the lands adjoining, it was thought expedient to give a special jurisdiction to the commissioners of Glamorganshire by statute.

And thus by 1 Mar. sess. 3, c. 11, ss. 1 and 2, after reciting the beneficial objects intended by the statute 23 Hen. 8, and, moreover, that it was then the prevailing opinion, that the act of Hen. 8 did not extend to repair any mischief done by reason of sand arising out of the sea, and driven to land by storms and winds so as to cover and render unprofitable much good ground lying on the sea coast; for remedy whereof, it was enacted, that the commissioners for the county of Glamorgan, or six of them, whereof three to be of the quorum, might act and make laws for the regaining and delivering these lands from the sea sands, as they were empowered to do by the statute of Hen. 8 for the withstanding and avoiding the outrageous course or rage of the sea, or other waters.

And now the statute 3 & 4 Will. 4, c. 22, has taken an extensive range of this subject, conferring an ample power to repair ancient defences, as well as with certain consents (*e*) create and preserve new works. Thus by sect. 19, it shall and may be lawful, &c., for any Court of Sewers to decree and ordain any new walls, banks, sewers, guts, gotes, calcies, bridges, tunnels, culverts, sluices, floodgates, tumbling bays, cuts or other works, aids and defences, or any alteration in the gauge, dimension, course, direction or situation of any old or existing walls, banks, rivers, sewers, guts, gotes, calcies, bridges, tunnels, culverts, sluices, floodgates, tumbling bays, cuts and other works, aids and defences to be constructed, made and done for

(*d*) See Callis, 104, who mentions two local statutes by which commissioners were authorized to go through private grounds, upon making compensation.

(*e*) Sect. 21, *post*.

the more effectually defending and securing any lands, tenements, hereditaments and premises within the jurisdiction of such Court against the irruption or overflowing of the sea, or for draining and carrying off the superfluous fresh waters, according to the wisdom and discretion of such Court, and also, in like manner and at their discretion, to decree and ordain any former walls or defences against the sea, or against any rivers, streams, sewers or watercourses, within their commission, to be abandoned and given up, and new defences and walls, banks, sluices, floodgates, tumbling bays, cuts and other works to be made and continued in lieu thereof; and in every such case to direct by inquiry and presentment of a jury in what manner and proportions the same shall thereafter be repaired and maintained by the person, body politic or corporate, deriving advantage or avoiding damage thereby or therefrom, having regard to previous liabilities in respect of the walls and defences so to be abandoned and given up.

There is a saving clause as to Sandwich Haven. Thus, by sect. 20, nothing hereinbefore contained, &c., shall be construed to authorize or empower the commissioners acting under any commission of sewers for the county of Kent, or any limits or district within the same, to decree or ordain any wall, bank, sewer, gut, cut, gote, calcey, sluice, floodgate, tumbling bay or other work, aid or defence to be constructed, made or done for conveying the waters of the river Stour, above Sandwich Bridge in the county of Kent, into the part of Sandwich Haven below the bridge, or into the sea at Pegwell Bay, not authorized by an act passed in the sixteenth year of the reign of his late Majesty King George the Third, intituled "An Act to enable the Commissioners of Sewers for the several limits in the eastern parts of the county of Kent more effectually to drain and improve the lands and grounds within the general valleys," or so as in any manner to affect, alter or interfere with the provisions of the said act for the preventing of prejudice to Sandwich Haven.

There follows, however, a proviso by sect. 21, "that none of these works shall take place, *i. e.*, where none have or hath or shall have theretofore been," without the consent in writing,

certified to the Court of Sewers, of the owners and occupiers respectively, or their respective husbands, guardians, trustees or feoffees, committees, executors or administrators of three-fourths at the least in value of the lands and hereditaments lying within the valley, level or district proposed to be charged with the costs and expenses of making the new works. It will be observed, that the assentients must be three-fourths in value, not merely in numbers. Again, by 24 & 25 Vict. c. 133, s. 29, before commencing any improvements in existing works, or any new works, where the same will cost more than 1,000*l.*, plans and estimates, and the area within which the rate is to be levied must be produced, with a list of the names and addresses of proprietors within the area, and the respective acreages. Two months' notice must also be given: 1, by advertisement, stating the work, the expense and the area, with a reference to plans or boundaries or otherwise, and the place where such may be inspected. 2. By placing a copy of the notice on the doors of the church for three successive Sundays. By sect. 30, the list of proprietors may be corrected within the two months, as well as the acreages, upon application to the commissioners, whose decision shall be final. After the two months the settled list shall be conclusive evidence of proprietorship with regard to dissents. By sect. 31, the dissent of one-half of the area shall stop the work, upon notice in writing left at the office of the commissioners. If no such dissent be shown, the works, after the two months, may be begun; and all expenses, not exceeding the estimate, paid out of the rates within the area. By sect. 32, if no proprietor of any particular land should appear, his name shall be included in any computation.

Moreover, the stat. 11 & 12 Vict. c. 63 (The Public Health Bill), enabled the local board appointed or elected under that act to make contracts for carrying the act into execution. If the board make a sewer through private lands, they must make compensation, and it is no defence that the plaintiff has sustained no damage by the making of the sewer (*f*).

The 85th section of this act sets forth full particulars con-

(*f*) *Re Arbitration between Bradley and the Local Board of Southampton*, 24 L. J., Q. B. 239; 4 El. & Bl. 1014.

cerning these contracts, which of course embrace sewerage and drainage, as well as other sanitary improvements.

But whatever might have been the differences of opinion in former times respecting new defences, the making of new works, not being *immediately* connected with the general welfare, was never deemed to be within their reach. Thus, in the case of the Isle of Ely, one of the points there discussed was, whether certain commissioners had done right in decreeing that a new river should be made out of the old river of Ouse, and through the main land within the same isle, for seven miles; and the Court held, that no such power was vested in those officers. For if commissioners were *ex officio* enabled to perform such undertakings, great inconvenience for private lucre's sake might ensue, as well in respect of public damage, as the stopping of havens, and other common rivers, as of particular nuisances and prejudices to private men, by the drowning of their lands and inheritances. It was, therefore, holden, that such new rivers could not be made without the king's licence, grounded upon the writ of *ad quod damnum* (g).

Nor can the commissioners of sewers improve the navigation of a river, or make a river navigable, which was not so before. And although this position may at first seem to clash with the doctrine so often mentioned before, namely, that commissioners may act very remedially for the advancement of commerce, and in furtherance of navigation; yet it will be recollected, that their power has never been asserted to extend beyond the removal of obstructions, or, at the most, the erection of new defences, which might in some measure be beneficial to traffic. An order was made by certain commissioners, charging the inhabitants of Westham for the erection of a tumbling bay, in order to prevent any inconvenience which might arise from a lock which had been set up, and assessing them for a lock, to prevent the damage which the tumbling bay would occasion to the navigation. In the order, the first lock was mentioned to have been erected for a private benefit. It was moved to quash this order; and the Court were clear that it was invalid, for

(g) The case of the Isle of Ely, 10 Rep. 141; Mich. 7, Jac. 1.

the commissioners possessed no power to charge inhabitants for finding an expedient how a thing erected for a private benefit might be continued, and yet be no nuisance; they ought to have abated the nuisance. And with regard to improvements, the Court added, that commissioners might preserve a river in its original state, by removing obstructions, and by other natural ways; but that they could not even help the navigation by erecting locks, or by any such artificial methods (*h*). And from hence, too, it appears plainly, that nothing of a private nature can be meddled with, unless it be for the public general good; and *à fortiori*, no private interests can be served, except by the intervention of an act of the Legislature.

Destruction
of annoy-
ances.

The next consideration which we propose, is the duty of commissioners of sewers in the destruction and abatement of annoyances. The impediments to navigation, and to the due maintenance of sewage, have been mentioned above, such as mills, wears, flood-gates, &c.; and it has been shown, under the question of survey already discussed, that annoyances of these descriptions are specially entrusted to the authority of commissioners. The construction of the statutes concerning the abolition of these annoyances has been, that wears, mills, and other such impediments, which exist without lawful warrant or authority, are within the reach of commissioners, who may abate them at their discretion. And the meaning of these words, "lawful warrant and authority," is held to mean custom or prescription.* So that a mill or wear which has attained to an immemorial existence, cannot be interfered with (*i*).

And further, if these immemorial wears, &c., should have been enhanced so as to exceed their ancient size and compass, the commissioners are empowered to abate and pull down the excess only (*h*).

(*h*) *The Queen v. The Inhabitants of Westham in Essex*, 10 Mod. 159; and see *Callis*, 270.

* The statute mentions the time of Edward 1. Mills, &c., erected before that time are exempt from the jurisdiction of commissioners, unless they be afterwards enlarged so as to become nuisances, 10 Rep. 138; 7 Com. Dig. 342.

(*i*) See *Callis*, 256, &c. The case of *Chester Mill*, 10 Rep. 138. The case of *Sewers*, 13 Rep. 36.

(*h*) 10 Rep. 138 (*b*).

And it is again observable, that the destruction of these matters is left principally to the discretion of the officers of sewers, for such mills, &c., only as are hurtful ought to be abolished; for as Callis declares, “in some great havens and ports, great abundance of piles and timber posts are set in the waters to stay the rage, force, and violence of the waters, for the safeguard of the port and haven” (*l*).

Clearly, therefore, if a stranger presume to meddle with these matters within the limits of a commission of sewers, or if he pitch down piles, or places stakes in any rivers or streams, he may be punished by fine or amerciamment, and be compelled to remove the nuisance at his own expense (*m*).

Some few cases concerning the removal of the impediments above alluded to shall be added here in their order. In an old case, it was presented in the King’s Bench, that one W. had obstructed the course of the water of S., by suffering trees to grow upon the bank to the hindrance of navigation; and the Court did not incline that he should be fined, because the growing of the trees was not his act; yet they agreed, that if the nuisances were not removed, some remedy should be applied (*n*).

Upon another occasion, where a presentment had been found before commissioners, that certain persons had turned the course of the river Lea, having obstructed it with piles and stakes to the hindrance of the craft which were accustomed to pass along there, it was decreed, that those who were presented by name, and had done part of the nuisance, should reform the same; and as to the other part of the nuisance the sheriff was directed to reform it, the names of the other parties not having been discovered: the sheriff to take the proprietors of the adjoining grounds to his assistance for that purpose (*o*).

Mr. Sergeant Callis reports the following case, which occurred in 19 Jac. 1. Queen Mary was seised of the manor of Mon-

(*l*) Callis, 266.

(*m*) *Id.* 267.

(*n*) 42 Ass. pl. 14, B.; and see Callis, 268, 269.

(*o*) 19 Ass. pl. 6; and see Callis, 269.

mouth, and of a free fishing in the Wye, and of a wear and fish-yard there. The wear appeared clearly to have existed from time immemorial, and it came after various leases and assignments to the plaintiff. In the year above mentioned, however, the commissioners of sewers caused a jury to be empanelled concerning this wear and fish-yard; and they found, that the plaintiff was possessed of the wear in question, that it was very high and hurtful, and a considerable impediment to navigation; and that but for the wear, boats of two or three tons could pass over the river; that the wear was otherwise mischievous, and a great annoyance to the whole country. The commissioners decreed the abolition of the alleged nuisance in consequence of this verdict, and the destruction was effected accordingly. But the plaintiff brought the case into the Duchy Court at Westminster, and the Court, consisting of several Judges,* were of opinion, that being an ancient wear it ought not to have been so overthrown by the decree of the commissioners; and that although it had been presented by the jury that the wear was high and enhanced, yet because it had not been stated how great the increase had been, nor in what particular place it had occurred, that therefore the verdict was of no validity (*q*).

The next case was where one Hide moved to quash an indictment taken before commissioners of sewers, for a nuisance to the high road, by penning back water in the river at his mill, so that the banks were overflowed, and thus the way was damaged. And it was objected, that the indictment had not laid the stream to have been a navigable river; but Roll, C. J., overruled that difficulty, mentioning another, however, which he deemed unanswerable, namely, that commissioners of sewers had no authority to meddle with nuisances in the way, but only with passages by water. And the indictment was quashed (*r*).

Then, in the next reign, an order was made by commissioners of sewers upon a miller, that he should repair his

* Sir Humphry May, Chancellor; Baron Denham, Chamberlain, J., &c.
(*q*) Hall v. Mason and others, Callis, 262.

(*r*) Rex v. Hide, Sty. 60.

floodgates, and make them of less size than before; and amongst other objections taken to these orders, it was said, that the commissioners could not do this, because the mill ought to be presumed to have been an ancient mill. But the Court said, they would not intend this to be a mill erected before the time of Edw. 1; and then, in the absence of any evidence of its being an immemorial mill, the commissioners might certainly require the alterations which had been resisted. But the order was held void, notwithstanding, upon another ground (*s*).

Further, it is observable, that commissioners are bound to abate these nuisances, and not merely to qualify them (*t*). As in the case of the tumbling bay and lock above referred to, it was not competent there for the commissioners to attempt a modification of the mischief which was anticipated from the making of a lock, their duty being to extirpate the annoyance. A case occurred lately, in which the directors of the Bristol dock company were held strictly to this principle under the provisions of the statute enabling them to alter and reconstruct rivers, upon the formation of a floating dock at Bristol. The act of 43 Geo. 3, c. 140, empowered them, at the charge of the company, to form and complete a common sewer at a certain place, [at Bristol], and also to form and complete collateral sewers leading thereto, and to alter the sewers of Bristol in such a manner as that the sewage discharged into the Avon above Bristol Bridge might be for the most part carried off, and not permitted to mix with the water in the floating harbour; and, further, to make such alterations and amendments as might be deemed expedient in consequence of the floating harbour before mentioned. In pursuance of this act, alterations were made in the sewers, but an offensive nuisance was left, to the great annoyance of the neighbourhood; for although the sewers were discharged considerably under the surface of the floating harbour, the sewage continued to be highly obnoxious. A mandamus was then applied for to compel the directors to make such alterations and amendments as became necessary in consequence of the harbour, and which, moreover, were prescribed by act of Parliament. The directors returned, that they had done all in

(*s*) *Inhabitants de Oldbery v. Stafford*, 1 Sid. 145.

(*t*) 10 Mod. 159.

their power towards the fulfilment of the statute, that they had altered, amended, and reconstructed sewers, but that as long as the sewage continued to be discharged under the surface of the floating harbour, according to the directions of the act of Parliament, the nuisance must continue, and could not be removed, and that the only remedy would be by constructing new sewers, and that they had no lands through which any new sewers could be made. But the Court held this return invalid, and awarded a peremptory mandamus. It had been objected to the writ, first, there was no distinct allegation that the alterations became necessary in consequence of the discharge of the sewage into the floating harbour: this, however, although no direct allegation had indeed been made, was expressed virtually by terms which could not be misunderstood: then, secondly, when the application was made to the company, no specific alterations or amendments had been mentioned, and the writ, consequently, took notice of none such. But the mode of proceeding in making these alterations was left to the discretion of the company, and the specification, therefore, was neither necessary nor proper. Then, with respect to the return, the Court held, that the power of discharging the sewage under the harbour was quite consistent with an authority to carry the sewers elsewhere, if expedient. The words "alterations and amendments," gave the company a full power to do all that might be requisite in consequence of the creation of this floating harbour. It had been contended, that as the company did alter the sewers so as to discharge them under the surface of the water of the floating harbour, they had done all that had been required of them. But if so, the latter part of the clause would be wholly inoperative: it might as well be supposed that the Legislature had given the company power to keep out the tide by stopping the course of the rivers Avon and Frome: and that although the rivers were thereby rendered so corrupt as to prove unhealthy to all the neighbourhood, still that the nuisance should be suffered to exist. The return was consequently quashed, and a peremptory mandamus awarded^(u). Holroyd, J., had at first doubted whether the company were not bound to discharge the whole of the sewage into the floating

(u) *The King v. The Bristol Dock Company*, 6 B. & C. 181.

harbour, but he subsequently considered, that a discretion had been vested in the company as to which sewers they might think fit to discharge into the harbour, and that the words of obligation, as to discharging them under the surface of the water, would be satisfied by applying them to the sewers so let into the harbour by the discretion intrusted to the company (*x*).

Next, with respect to annoyances, impediments, or nuisances upon the grounds of private persons, it may be remarked, that although commissioners of sewers cannot confer any benefit upon such lands for the sake of individual convenience, yet they may enter there to abate mischiefs which are occasioning damage to the community. So that if there be an ancient bridge over a great or less river over which a certain person and his ancestors have been accustomed to pass towards the church, or the pasture lands, or the common, the commissioners may destroy even this bridge if it be injurious to the public; and, on the other hand, they may maintain it against the violence of the waters, if necessary (*y*).

Private
nuisances.

Nevertheless, the learned Callis is of opinion, that great caution should be adopted in abolishing bridges which have acquired an immemorial antiquity, since "time hath given great approbation of them" (*z*); and in a subsequent part of his work, he clearly intimates that no mills, *bridges*, &c. should be overthrown, unless they really be lets or impediments to navigation (*a*).

Again, the learned sergeant observes with respect to private walls, that in the county of Lincoln and other places in the realm, many private persons have, for inning and for the safety of their marshes and marsh grounds, cast great banks for their private uses; and that although such banks were not within the protection of the laws of sewers so as to be maintained by virtue thereof, yet that they might be extirpated if it should appear

(*x*) *The King v. The Bristol Dock Company*, 6 B. & C. 193.

(*y*) Callis, 89.

(*z*) *Ibid.*

(*a*) *Id.* 266.

that their continuance were a hindrance to the common good of the county (*b*).

We have seen in the first chapter, that a new jurisdiction has been created respecting sewers by the statute 11 & 12 Vict. c. 63 (*c*). And it was there mentioned, that the 43rd section of the same statute vested, amongst other things, all sewers, subject to certain exceptions there mentioned, together with all buildings belonging thereto, in the local board (*d*).

The duties and powers of this local board, with reference to sewers, are sufficiently extensive to require a separate notice.

The 11 & 12 Vict. c. 63, s. 44, enacts, that the local board may purchase sewers subject to private rights; and by sect. 45, they shall repair the sewers thus vested in them, and may make such sewers as may be requisite within their district. For this purpose, the board may carry such sewers or drains through, across, or under any turnpike road, or any street or place laid out or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street; and, after reasonable notice in that behalf, into, through, or under any lands whatsoever.

Secondly, They may enlarge, lessen, alter, arch over, or improve any of these sewers, and discontinue, close up, or destroy such as they may deem unnecessary. But such discontinuance, &c. of the sewer must be so done as not to create a nuisance; and if any person should be deprived of the lawful use of any sewer by reason thereof, the local board must provide a sewer as effectual as that which they have taken away. On the other hand, they are not empowered to make new sewers out of their district. The Local Government Act (*e*) only permits the exercise of powers beyond the district for the purpose of outfall or distribution of sewage. So that

(*b*) Callis, 76.

(*c*) *Ante*, p. 18.

(*d*) *Ante*, p. 26.

(*e*) 21 & 22 Vict. c. 98, s. 30. They may dispose of sewage, sect. 30; and may obtain an order from a justice to cleanse all foul watercourses and ditches, sect. 31. As to the sewerage of highways, see sect. 38.

an injunction was granted against the local board (*f*). Nor can a vestry under 18 & 19 Vict. c. 120, s. 76, compel a man to construct a sewer. Even where one was built under a misapprehension, the vestry could not compel him to continue it, and an injunction was granted to prevent the vestry from exercising acts of demolition or injury (*g*). But they have a right to dictate which sort of pipes shall be used, as Lambeth or Aylesford, so that where the plaintiff did not obey the vestry by putting down Lambeth pipes, the Court refused an injunction to hinder them from entering his premises to take up the Aylesford pipes (*h*). Again, the powers of commissioners are by no means unlimited. If they have power to drain, they must not drive away the fish, nor hinder cattle from drinking the water of a river, although seven miles distant from the property of the person aggrieved. Even, if they had used such a right before that act, they would not be justified. A borough council having assured the plaintiff that no mischief would occur, the lapse of four years was considered to be no laches. For the *prospect* of an injury does not give a right to relief (*i*).

The cleansing of the sewers comes next. By sect. 46, it lies upon the local board to cause these sewers to be so kept as not to be a nuisance, and to be cleared, cleansed, and emptied. In order to do this, they may construct, either above or under ground, any reservoirs, sluices, engines, and other necessary works, and cause all or any of such sewers and drains to communicate with and be emptied into such places as they may think fit, or they may collect and sell the sewage, but not so as to create a nuisance. But they cannot make these reservoirs upon private grounds without an act (*j*). Then follows a penalty for making sewers unauthorized by the local board. By sect. 47, no sewer or drain shall communicate with or be emptied into any sewer belonging to the local board, nor shall any building be erected over such last-mentioned sewer, nor shall any vault, arch, or cellar be built under the carriage-way of any street, without the consent of the local board. A breach

(*f*) *Hayward v. Lowndes*, 28 L. J., Ch. 400; 4 Drew. 454.

(*g*) *Clarke v. Paddington Vestry*, 5 Jur. (N. S.) Ch. 138.

(*h*) *Austin v. Lambeth Vestry*, 27 L. J., Ch. 677.

(*i*) *Attorney-General v. Birmingham Borough Council*, 4 Kay & J. 528.

(*j*) *Sutton v. Mayor, &c. of Norwich*, 27 L. J., Ch. 739.

of this law is punishable by a penalty of 5*l.*, to be forfeited to the board (*k*), and a further penalty of 40*s.* for every day during which the offence shall be continued, after notice in writing from the board (*l*). And if any sewer, drain, building, &c. be so made, the local board may cause it to be altered, pulled down, &c., and the expenses incurred may be recovered in the summary manner provided by the act (*m*). But by sect. 48, any owner or occupier of premises adjoining or near to, but beyond the limits of any district, may cause any sewer or drain belonging to such premises to communicate with any sewer of the local board, upon such terms as may be agreed upon between such owner and occupier and the local board, or, in case of dispute, as shall be settled by arbitration (*n*).

The consideration of an improved sewerage, whether by the maintenance of drains, or the closing of offensive ditches, &c., is further carried on in the following clauses. The 49th section provides, that no house shall be built or rebuilt, where it has been pulled down as far as the ground floor, without covered drains, to be constructed upon the report of the surveyor, so as to provide effectual drainage. If the sea, or a sewer belonging to the board, be within 100 feet of any part of the site of the house in question, the drains shall communicate with one of those means of drainage as the local board shall direct. If there be no such means of drainage, then the drains shall empty themselves into such covered cesspool, or other place, not being under or within such distance from any house, as the board may direct. Disobedience to this law is punishable by a penalty of 50*l.*, to be sued for by any person by action of debt.

Again, if the surveyor should report to the board that any house within the district, whether built before or after the act may be applied, is without a drain, or without such a drain communicating with the sea, or a sewer, as may be sufficient for proper drainage of the house, and if the sea or a sewer belonging to the board be within 100 feet of any part of the house, the board shall give notice in writing to the owner or occupier, requiring him forthwith, or within a reasonable time

(*k*) See sect. 129.

(*l*) Ibid.

(*m*) Ibid.

(*n*) See sect. 123, &c.

therein specified, to construct and lay down in connection with such house, and one of those means of drainage, one or more covered drain or drains, as the report shall declare to be necessary. If the notice be not complied with, the local board may do the work, and the expenses shall be recovered in a summary manner (*o*), or deemed private improvement expenses, and shall be recoverable accordingly (*p*).

And as to houses now built, the stat. 7 & 8 Vict. c. 84, s. 51 (the Metropolis Buildings Act), provides, that the drainage shall be conducted according to Schedule (H.) of that act (*q*). And any person making default shall be liable to such penalties as are attached to persons building contrary to the act (*r*). Moreover, as to the communication of such drains with sewers, the same Schedule (H.) must be followed; unless its provisions be repugnant to the orders of commissioners of sewers, for the powers of those commissioners are expressly saved by this clause. And the stat. 18 & 19 Vict. c. 30, now at an end, conferred further powers upon these commissioners with regard to the drainage of houses, especially with a view of guarding against zymotic diseases (*s*).

Where the evidence of scientific men conflicted, an injunction was refused to hinder the vestry from meddling with pipes of peculiar construction (*t*). And the bill was thereupon dismissed with costs (*u*).

There is a beneficial clause for small parishes, enabling them to have the benefits of sewerage and of water at the expense of the poors' rate. By 11 & 12 Vict. c. 63, s. 50 (the Public Health Act), if a majority of not less than three-fifths of the rated inhabitants of any parish or place, containing less than 2,000 before the last census, shall be of opinion at a public

(*o*) See sect. 129.

(*p*) See sect. 90. And as to the recovery of these private expenses, see sect. 103, &c. And see sect. 75, as to the supply of water to houses.

(*q*) See the schedule.

(*r*) Under sects. 13 and 18.

(*s*) A statute of three sections to be construed as one with 11 & 12 Vict. c. 112.

(*t*) *Austin v. St. Mary, Lambeth*, 27 L. J., Ch. 388.

(*u*) *Id.* 677.

meeting (*x*), (the parish or place is to be one not affected by any order of council or provisional order under the act), that any pool, place, open ditch, sewer, &c., should be drained, cleansed, &c., or that a sewer should be made or improved, a well dug, or pump provided for the inhabitants; the churchwardens and overseers of the parish shall procure an estimate, and call another meeting for the purpose of approving of such estimate; after which, if such estimate shall be approved by the majority, the works in question shall be executed by the direction of such churchwardens, &c., and the costs of the same paid out of the poor's rate.

Again, by sect. 51, there must not be any new house, nor may any house be rebuilt as aforesaid, without a watercloset or privy, and an ashpit, with proper doors and coverings; and a penalty of 20*l.* is awarded for a default in this particular (*y*). And if the surveyor to the local board should report that there is an absence of such privy, &c., *in any house*, the local board shall give notice in writing to the owner or occupier, requiring him to provide those conveniences. Then, upon his neglect, the local board may do these or any other necessary works, the costs of which may be recovered in a summary manner (*z*), or be deemed private improvement expenses (*a*). However, should it appear that the inmates of two houses are in the habit of using the same privy, &c., or that, in the opinion of the local board, there needs not be more than one, it shall not be necessary to provide one for each house.

By the 52nd section, also, waterclosets shall be established in factories, or other buildings, where above twenty persons of both sexes are employed, or intended so to be. The owner or occupier, after notice in writing from the board, must construct a sufficient number of such waterclosets, for the separate use of each sex, under a penalty of 20*l.*, and a further penalty, not exceeding 40*s.*, for every day of default (*b*). And by sect. 57,

(*x*) Which is to be called by the churchwardens and overseers by a similar notice to that directed to be given to superintending inspectors under sect. 9.

(*y*) This would apply only to houses within some district.

(*z*) See sect. 129.

(*a*) See sects. 90, 103.

(*b*) See sect. 129.

the board may provide public necessities, and pay the expenses out of the district rate.

By 21 & 22 Vict. c. 98, s. 34, every local board may make bye-laws as to the level, width and construction of new streets, and the provisions for the sewerage thereof, and with respect to the drainage of buildings to waterclosets, privies, ashpits, &c.

Invested with such unlimited powers over drains and sewers, there is yet an obligation upon the local board that there shall be no nuisances. For instance, by 11 & 12 Vict. c. 63, s. 54, it is a duty of the local board to see and make provision that all drains, privies, &c., within their district, are so constructed as not to be a nuisance, nor injurious to health. The surveyor, with a written authority from the board (but such authority cannot be given unless there be a written complaint from some person concerning the drain), may enter the premises of an occupier, after twenty-four hours' notice, or, in case of emergency, without notice, may cause the ground to be opened, and lay open any drains, &c., with or without assistants. If the drain, &c., turns out to be in good condition, the surveyor shall immediately have the ground closed, and, as soon as possible, make good any damage, and the expenses of these works shall be defrayed by the board. On the other hand, if the drain, &c., turns out not to be in good condition, or requires alteration, then the local board must give the occupier notice to execute the necessary work within a time therein specified; and should he make default, the local board shall then do the work, and the expenses shall be recovered in a summary manner (*c*), or be deemed private improvement expenses, and recoverable as such (*d*). But time may be allowed by the board for repayment by annual instalments, not being less than one-thirtieth, with interest at 5*l.* per cent., the mode of recovery being nevertheless permitted, in default of repayment, as in

(*c*) See sect. 129.

(*d*) See sects. 90, 103.

other cases (*e*). The local board are the judges of these works, not the justices. The justices cannot review the determination of the board (*f*).

Again, the 58th section imposes another duty of this nature upon the board. For they must drain, cleanse, cover or fill up all ponds, pools, open ditches, drains and places of drainage containing filth, &c., or any matter prejudicial to health. They shall cause notice to be given to the person causing the nuisance, or to the owner or occupier of any premises, requiring him to drain, &c. such places, or to construct a proper sewer or drain. Upon the default of the person thus warned, the local board may do the necessary works, and the expenses may be recovered in a summary way (*g*), or be deemed private improvement expenses, and be recoverable as such (*h*). Still the local board may order that a portion of the expenses incurred in such works may be defrayed out of the general or special district rates. Under 21 & 22 Vict. c. 98, s. 32, the times and manner of cleansing and emptying privies, &c., is to be regulated by a bye-law of the local board. The same clause provides for the cleansing of the streets, and other such matters. By 11 & 12 Vict. c. 123, s. 7, to suffer any sewage, &c. to run, flow into, or remain in any open ditch, gutter, drain or water course, so as to be a nuisance or injurious to health, from any new house, is declared to be a misdemeanor, or, in Scotland, an offence punishable by fine and imprisonment. And the offender shall be liable, in addition, to a penalty not exceeding 5*l.*, for every day during the continuance of the offence. This act is repealed, but another statute gives power to the local authority to lay down sewers or other structures and keep the same in good repair, and they have powers to enter lands for that purpose, and they may assess any houses, &c., to the payment of such expenses. This proceeding, however, applies to ditches, &c., which cannot be rendered innocuous without such a sewer or other structure. This act is the

(*e*) 11 & 12 Vict. c. 63, s. 146.

(*f*) *Hargreaves v. Taylor*, 9 Jur. (N. S.) 1053; 32 L. J., M. C. 111.

(*g*) See sect. 129.

(*h*) See sects. 90, 103.

18 & 19 Vict. c. 121, s. 22, authorizes the covering and improving of open ditches. Under this section houses were assessed which were then built and were using a sewer, and sums were set opposite to the names of the owners. A resolution was passed enabling parties to compound. The assessment did not provide for houses *to be* built. The rate was held good, and the resolution to compound was deemed to be no part of the assessment (*l*). Again, houses using a ditch or sewer were assessed at *6d.* And, by a separate resolution, composition was admitted. The composition was held to be distinct from the rate which was confirmed, and the resolution to compound was considered legal (*m*). The board cannot assess out of their jurisdiction. There were two houses in A. where there was a drainage which went into B. There was no nuisance in A. but A. was assessed. The rule to issue a distress warrant was discharged (*n*). Certain houses used a drain which was made innocuous by a district local authority. They were held not liable (*o*). But, upon another occasion, where the drainage passed through the sewers, it was held, that this was a using within the act (*p*). The board cannot proceed before justices for the pollution of a watercourse where both cause and effect are out of their jurisdiction (*q*). The local authority must assess the houses, &c., using the sewers, &c., before they can resort to the highway rates, and an order to the contrary made by justices was quashed (*r*).

Again, there is a provision against the overflow of waste water and privies. For by 11 & 12 Vict. c. 63, s. 59, whosoever keeps any swine or pigstye in any dwelling-house, so as to be a nuisance, or suffers any waste or stagnant water to remain in any cellar or place within a dwelling-house for twenty-four hours after notice in writing from the local board to remove the same, or

(*l*) *R. v. Middlesex Justices*, 2 Jur. (N. S.) 1045.

(*m*) *Sembl. S. C. nom. R. v. Warner*, 6 El. & Bl. 395.

(*n*) *R. v. Warner*, 27 L. J., M. C. 144.

(*o*) *R. v. Tatham*, 8 El. & Bl. 915; *Ex parte Hornsey Local Board*, 4 Jur. (N. S.) 609; *nom. R. v. Warner*, 27 L. J., M. C. 144.

(*p*) *R. v. Bodkin*, 30 L. J., M. C. 38.

(*q*) *R. v. Cotton*, 28 L. J., M. C. 22. As to the distinction between a mere order to abate a nuisance under 18 & 19 Vict. c. 121, s. 12, and structural works under s. 16, see *Ex parte Mayor of Liverpool*, 27 L. J., M. C. 89.

(*r*) *R. v. Gosse*, 30 L. J., M. C. 41.

shall allow any privy, &c., to overflow or soak therefrom, shall forfeit 40s., and 5s. a day besides, for every day during which the offence is continued (*s*). Every such nuisance shall be abated by the local board, and whatever expense they may be put to in so doing, shall be reimbursed by the occupier, and recoverable in the summary manner provided by the act (*t*). And if the inspector of nuisances should be of opinion at any time that any accumulation of dung, &c. should be removed, he shall give notice to the person to whom it belongs, or to the occupier, to remove it. And if after twenty-four hours the notice be not complied with, all such dung, &c. shall be vested in and sold by the local board, and the proceeds carried to the district fund account.

And by sect. 60, if upon the certificate of the officer of health, or of any two medical practitioners, the local board shall be of opinion that any house or part thereof is in a filthy condition, so as to endanger the health of any person, or that whitewashing, cleansing, &c. will tend to check or prevent disease, the board shall give notice in writing to the owner or occupier to whitewash or otherwise cleanse the same, and, upon default, he shall be liable to a penalty of 10s. a day during such default. And the board may cause such house to be whitewashed, &c., and the expenses shall be repaid by the owner or occupier, and be recoverable in a summary manner (*u*).

Nevertheless it is declared and enacted by sect. 65, that nothing in this act shall be construed to legalize any nuisance independent of the act, nor to exempt any person from liability, prosecution, or punishment, in respect thereof. These latter provisions are made general throughout Great Britain and Ireland, by an act passed for the speedy removal of nuisances (*x*), unless there should be a local board in any district (*y*).

By sect. 41, the local board shall, if they think fit, cause a

(*s*) See sect. 129.

(*t*) Ibid.

(*u*) Ibid.

(*x*) 11 & 12 Vict. c. 123, ss. 1, 2. And as to the recovery of expenses, see *Id.* ss. 3, 4. This statute, however, and 12 & 13 Vict. c. 111, were repealed by 18 & 19 Vict. c. 121, and other provisions were made.

(*y*) 11 & 12 Vict. c. 123, s. 5. And as to the matters connected with the mode of executing the act, see sect. 16, *et seq.*

map of sewerage to be made upon a scale to be prescribed by the general board. It is to be kept at their office, and to be open to inspection. And by sect. 42, the expense of the surveys, &c. shall be borne by the general district rate.

The 74th section directs the local board to provide premises to be used as public walks and pleasure grounds, and to support or contribute to any such premises when provided by any person.

Then follow sections concerning supplies of water for the purposes of drainage, to which we will shortly advert, as being nearly connected with sewerage.

By sect. 75, the local board must provide supplies of water for sewerage, drainage, cleansing the streets, and for the domestic use of the inhabitants, and for these purposes they may contract with persons, and purchase waterworks, &c. And any Water Company may make a contract for such supply, or sell their waterworks to the board. But if any Waterworks' Company within the limit should be willing and able to lay on the water required, the board must not in that case interfere to construct their own works. The purposes, however, for which such water is required, and the terms upon which the Waterworks' Company must supply it, are to be fixed by the general board, upon report and inquiry of a superintending inspector; and all differences as to such arrangements, as well as the ability of the company to supply the water, shall be settled by arbitration (z).

Moreover, the board must provide and maintain good and wholesome water, and so as to reach the top of the highest house in their district (a).

By sect. 76, if it should appear upon the surveyor's report that any house is without water, and that a supply of water can be furnished at twopence a week, notice is to be given to the

(z) See sect. 123, &c.

(a) Sect. 75, *ut supra*.

occupier to do the necessary works; and, upon his default, the board may do the works, levy a water rate, and recover the expenses as private improvement expenses (*b*).

The 79th section inflicts a penalty of 5*l.*, to be forfeited to the board, and a further penalty of 20*s.* per day during the continuance of the offence, upon all persons injuring or damaging the waterworks, or diverting or wasting the water (*c*). But it is provided, that the owner and occupier of any house may use streams of water as they were wont before the passing of the act. Again, the 80th section prescribes a penalty of 5*l.*, and 20*s.* a day during the continuance of any offence, after a written notice, committed by persons bathing in water belonging to the board, or fouling the water in any way (*d*). And if any gas proprietor, or person engaged in gas works, shall suffer any washing or substance used in the manufacture of gas, to flow into any stream, reservoir, &c. belonging to the local board, or wilfully do any act to foul the water, or whereby it may be fouled, he shall forfeit 200*l.*, and after twenty-four hours' notice in writing from the board, a further sum of 20*l.* per day during the continuance of the offence, to be recovered by action of debt. And further, if the water be in any manner fouled by the gas of a proprietary of gas, the proprietor, &c. shall forfeit a sum not exceeding 20*l.* to the local board, and a further sum not exceeding 10*l.* for every day of the continuance of the offence, after twenty-four hours' notice in writing from the local board (*e*). And in order to ascertain these matters, the local board may lay open the gas works, giving twenty-four hours' notice of the time of examination. Then if the fact be affirmed against the gas works, the expenses of the examination shall be paid by the proprietor, &c., and be recovered summarily (*f*). But if the contrary be proved, the local board shall bear the expense, which shall be paid from the general district rate, and be recoverable summarily (*g*).

(*b*) See sects. 90, 103, and sects. 77, 78, as to providing water for trading purposes, and for making public cisterns, &c.

(*c*) See sect. 129.

(*f*) *Ibid.*

(*d*) *Ibid.*

(*g*) *Ibid.*

(*e*) *Ibid.*

There are likewise several clauses providing for purchases of lands and for contracts by the local board (*h*).

By 24 & 25 Vict. c. 133, s. 58, no person shall drain any obnoxious matter into sewers without the consent of the commissioners, saving legal right, under a penalty of 5*l.*, and 40*s.* a day during the continuance of the nuisance.

(*h*) See 11 & 12 Vict. c. 63, ss. 84, 85.

CHAPTER III.

Of the Proceedings of Commissioners of Sewers in furtherance of the Powers intrusted to them.

IN the last chapter we took occasion to set out the particular authorities and powers which the statutes of sewers conceded to the commissioners for the purpose of carrying into effect the matters so intrusted to their charge; we now proceed to mention the various courses or proceedings which they may institute, in order to insure the sufficient and effectual accomplishment of their duties.

Thus the mode of summoning juries for the purpose of inquiring into neglects and defaults on the part of persons bound to keep defences in repair—the decrees and orders made by commissioners from time to time, directing the making of such necessary repairs, together with the general ability of those officers to ordain such laws at their discretion, as they may deem useful—the assessments imposed, as well as the manner of enforcing them,—will be treated of in the progress of the present chapter. But since parties who have been assessed to the charges of sewers, do not unfrequently omit or refuse to pay their contributions, commissioners are amply empowered to inflict various punishments and penalties upon such persons for their misconduct, and these measures of punishment, whether by fine, distress, imprisonment, or the sale of the defaulter's lands, will be respectively presented to the attention of the reader.

It will be, however, desirable that we should not omit to state the nature of the Court which commissioners of sewers are authorized to hold, in order to render effectual the intentions of the statutes; and, in pursuance of this, the particular jurisdic-

tion of these commissioners, and the power which they are enabled to exercise over officers appointed by them, with other incidental matters, will be noticed in the first instance.

Notwithstanding some ancient opinions to the contrary (a), it is now agreed, that the proceedings of commissioners of sewers are not merely ministerial, but judicial, and, consequently, that they have a Court; and, further, as they are empowered to hold pleas concerning the matters intrusted to them, their Court is one of Record, and an eminent Court of Record, as Mr. Sergeant Callis expresses it (b). And so Lord Coke, when writing of Courts, enumerates among them, "The Court of the Commissioners of Sewers" (c).

Commissioners of sewers have a Court of Record.

And by 3 & 4 Will. 4, c. 22, s. 60, the words "Court," and "Courts of Sewers," shall mean every Court, sessions, assemblage, or meeting of any six or more commissioners of sewers, (three whereof being of the quorum,) named in any commission of sewers, and acting in the execution thereof.*

Callis gives the following reasons for holding the opinions just mentioned. First, that these commissioners are frequently called *justices* (d); secondly, that legal proceedings and processes take place by their authority; thirdly, because the commission of sewers is a member of the ancient and renowned Court of Oyer and Terminer; fourthly, because commissioners have a clerk proper to themselves for the registration of their laws; fifthly, because they may make orders, and decrees, some of which cannot be reversed but by act of Parliament, and these orders and decrees are, in effect, judgments; and, lastly, because writs of error† have been brought to reverse judgments in the

(a) See Callis, 163, &c.

(b) Callis on Sewers, 164; 7 Com. Dig. 343.

(c) 4 Inst. 275. See as to the same effect, Mar. 291, by Brampton, C. J.; 8 Taunt. 631, by Burroughs, J.

* Moreover, the singular number and masculine gender shall include the plural number and feminine gender, and likewise bodies politic, &c., unless otherwise specially provided for.

(d) 12 Edw. 4, c. 7; 23 Hen. 8, c. 5, F. N. B. 113 (b); Mar. 201.

† But since the stat. 23 Hen. 8, no writ of error can be brought, because the proceedings are in English instead of Latin, as before. Nevertheless, the party aggrieved may discharge himself by plea, as in all cases where there is neither a writ of error, nor an *audita querelâ*; and, moreover, a

Court of Sewers (*e*). And the learned writer adds, that the circumstance of the Court not being holden in any particular place makes no difference (*f*).

The Court may be held without the limits of the commission, provided it be at no greater distance than ten miles* from any part of the district within their jurisdiction, and all laws, &c., made there are declared to be as valid and legal as though they were made within the limits (*g*).

Being in the nature of judges, commissioners of sewers are not liable to the same responsibilities as a sheriff, and so it was held in a case concerning costs (*h*).

By 12 & 13 Vict. c. 50, s. 1, commissioners are empowered to partition districts into sub-districts. By sect. 2, they may make a separate rate for each district. The 3rd section gives them authority to appoint dyke-reeves for both districts. By sect. 4, the dyke-reeve must be an occupier of not less than ten acres of sewable land, of full age and of sound mind. By sect. 5, he must serve without fee or reward, or, upon refusal, forfeit a sum not exceeding 20*l*. By sect. 6, upon the presentment of any dyke-reeve of any breach of the laws of sewers, the commissioners may impose a fine of 40*s*. as they now may, upon the presentment of a jury, &c., and no such fine shall be traversed. The 7th section gives a remedy by distress for the non-payment of sewers' rates and fines, and costs incurred in obtaining the warrant. In default of distress, the arrears may be levied upon the lands, &c., in like manner as if such lands had been assessed to the rates and fines. By sect. 8, one warrant may issue against several persons. By sect. 9, the warrant may be directed by the dyke-reeve, collector, bailiff, expeditor or other officer of sewers, or to any other person or persons, as any two

certiorari lies to remove all the proceedings into the King's Bench. By Brampton, C. J., Mar. 201. And there is not so great a strictness as in indictments, 1 Sid. 78.

(*e*) Callis, 165, 166.

(*f*) Ibid. 167.

* The stat. of William gave five miles.

(*g*) 3 & 4 Will. 4, c. 22, ss. 44, 45; 4 & 5 Vict. c. 45, s. 11.

(*h*) Pocock v. O'Shaughnessy, 6 Ad. & El. 808, n.

commissioners granting the same may deem fit. Sect. 10 is the interpretation clause.

In order to form a Court competent to sit by virtue of a commission of sewers, there must, at least, have been six commissioners present (*i*). But now three may be a quorum, except where existing works are to be improved or new works made (*j*). There is likewise a chairman, concerning whose appointment the Legislature has now interfered. For by 4 & 5 Vict. c. 45, s. 10, if any difference shall arise upon the choice of a chairman, at any Court or meeting of commissioners of sewers, such chairman shall be chosen by the majority of commissioners present, and in case of an equal number of votes, that person shall be chairman whose name stands first in the commission. The chairman, moreover, of any such Court or meeting, in case of an equal number of votes upon any question or matter (including his own vote) shall have a casting or decisive vote.

Six commissioners a Court.

The commissioners could always appoint their own days of meeting, and, therefore, in that respect the clause to which we now invite attention is declaratory. By 3 & 4 Will. 4, c. 22, s. 8, any three commissioners, or their clerk, upon the direction in writing of such three or more commissioners, shall appoint the first meeting of commissioners after the passing of the act as the commissioners shall ordain, ten clear days' previous notice being given by advertisement in some county newspaper.

The commissioners may adjourn according to their pleasure, or to the will of the major part present, and no order shall be made unless the major part present concur therein, subject, nevertheless, to the casting vote of the chairman, including his own vote (*k*). All acts, &c., may be done by such major part, provided only there be three commissioners present, as fully and effectually as if all the commissioners were present. However, supposing that a sufficient number of commissioners should not meet on the day appointed, or that there should be a default in duly adjourning any meeting, the 4 & 5 Vict. c. 45,

(*i*) *Brungy v. Lee*, 4 Inst. 275; Sty. 178.

(*j*) 24 & 25 Vict. c. 133, s. 15.

(*k*) 4 & 5 Vict. c. 45, s. 10.

s. 12, enacts and declares, that any one or more of the commissioners named in the commission may, by writing, appoint a Court or meeting, to be holden at such time or place as he or they may think fit. Ten clear days' notice of such meeting are to be given by advertisement in some newspaper circulated in the county into which the commission runs, or, where the same shall run into more than one county, then in some newspaper circulated in each of the counties. Yet, although the number of commissioners at a meeting may be less than six, the majority may adjourn the meeting. Although there must be three as a quorum to exercise the powers and authorities of the commission of sewers at any Court or meeting.

Special
meetings.

The statute 3 & 4 Will. 4, c. 22, s. 9, contemplates the necessity of special meetings upon emergencies. Thus, if after any adjournment a special meeting upon the happening of some emergency should be deemed necessary, any three commissioners, or their clerk, upon their direction in writing, may appoint such special meeting. Ten clear days' notice must be given by advertisement in some newspaper of the county, and generally circulated in the district, and no other than this special business shall be transacted at such meeting. Nevertheless, in the event of any imminent danger being apprehended from unusually high tides, or any other causes, and if two or more commissioners shall be of opinion that ten days' notice of the special meeting will be too long a delay, any two or more commissioners, or their clerk under their direction in writing, may convene, by a circular letter to each acting commissioner, a special meeting for as early a day as such two or more commissioners may deem it right to appoint: such circular must specify the particular object for which the meeting is convened, and no business shall be transacted thereat except what strictly relates to such object.

It becomes now our duty to inquire what proceedings these justices are warranted in adopting, in order to fulfil properly the duties committed to their charge. And, first, the appointment of fit persons to act as their officers in a matter of considerable moment.* The officers mentioned in the commission

* These officers are appointed at discretion, Callis, 113.

under the statute of Hen. 8, are keepers, bailiffs, surveyors,* collectors, expenditors(*k*), and other officers; and in a subsequent section (*l*), a remuneration of 2s. per day is prescribed for one clerk, to be assigned by them. And a further recompense is awarded to the clerk for writing of books and process,† and also to the collectors, &c., according to the discretion of the commissioners. The refusal to take an office of sewers, upon a due election by the commissioners, is punishable by fine (*m*).

One thing must be remarked here. The clerk and treasurer cannot be the same person. The stat. 3 & 4 Will. 4, c. 22, s. 51, forbids this; neither can the partner of any clerk, nor the clerk of any clerk be such treasurer, nor the clerk of the partner; and, *vice versâ*, no person in the employ of the treasurer can be clerk. If default be made in these respects, whether it be by the officer himself, or by deputy, or by any one officiating for him, or if the treasurer shall hold any other place of profit or trust under the Court except that of treasurer, he shall forfeit 100*l.*, to be recovered with full costs in any Court of Record at Westminster, by action of debt or on the case, or by bill, suit, or information, wherein no essoign, protection, or wager of law, nor more than one imparlance shall be allowed.

The wages above mentioned are said to be paid in consideration of service done in the execution of the commission. And it seems, that an officer of sewers so appointed is fineable for neglect. As if a collector, or expenditor, or other officer, have been careless of his duty, or commit falsities in his office, he

Officers
punishable
for misbe-
haviour.

* As to surveyors, see Callis, 106; and as to their presentment, see *post*.

(*k*) Dr. Lee, being appointed an expenditor, prayed his privilege:—1. As an ecclesiastic. 2. Because all the land he had in the marsh was leased for ninety-nine years. Dr. Lee was also an archdeacon. It was answered that the archdeacon's predecessors had executed the office. But the privilege was allowed and the writ granted, for the tenant, if any, ought to do the office, and Moreton, J., thought the first reason sufficient, 1 Lev. 303; Archd. de Rochester's case, 1 Vent. 105; 1 Mod. 282.

(*l*) Sect. 13.

† By 13 Eliz. c. 9, s. 6, the clerk, or clerks, shall estreat all fines and americiaments into the Exchequer, annually, under a penalty of 5*l.* With regard to the writ of *certiorari* at the suit of the clerks, or other officers, concerning their removal, it is of common right, as we shall see hereafter.

(*m*) Callis, 175.

may be fined, having been sworn duly to execute the same, whereas a neglect in an ordinary person is not to be punished by fine; although, of course, every one become answerable for the consequences of his particular misconduct. But if one be rated towards repairs, and he neglect to pay at the appointed time, he is not fineable, but is to be amerced (*n*).

Again, if a collector or expeditor be required by the Court to account for money received, and there be a refusal to do so, the party offending may be punished by fine (*o*), for the commissioners are intrusted with authority to hear and to examine the accounts (*p*), and are also expressly required to check negligence and malversation in officers, and the statute 3 & 4 Will. 4, c. 22, imposes other summary punishments (*q*). So, if an officer take more than he ought upon a distress, the commissioners will compel him to return the overplus (*r*).

Removal
of officers.

With regard to the removal of these officers, it seems, that it is competent for commissioners to deprive them of their respective situations, according to discretion. Yet the Court of King's Bench will, perhaps, direct a trial, in order that the title to the office from whence the complainant may have been removed, may be investigated. Thus, where a party having been appointed clerk to a commission of sewers by surprise, as it was alleged, he was turned out by succeeding commissioners of sewers, and another person was placed in his room by order. Upon this the Court of King's Bench were moved, and they granted a *certiorari* to remove the order, in order that they might see the title, adding, that if they should see cause, they would grant a trial; and some of the Court observed, that the office was like that of clerk of the peace. The reporter, however, makes a *quære* whether the clerk to a commission of sewers be not only at will (*s*).

(*n*) Callis, 174. Amerciaments are more merciful penalties than fines, and they are imposed by the jury; whereas fines are assessed by the Court.

(*o*) Callis, 175.

(*p*) Anon., 1 Ch. Ca. 232,

(*q*) Sect. 48, *post*.

(*r*) 7 Com. Dig. 341; Callis, 219.

(*s*) Rex v. Banks and Arthur, Fortesc. 374. S. C., 8 Mod. 331, nom. Arthur v. Commissioners of Sewers in Yorkshire. See Callis, 291.

Yet officers may be removed from the possession of the commissioners' works. By 3 & 4 Will. 4, c. 22, s. 49, if any officer or servant of any Court of Sewers shall be discharged, and shall be in possession of any houses, &c.,* and shall refuse to deliver up possession within two days after notice of his being discharged, and of his being required to give up possession, or of such notice being left at his usual place of abode; or, in like manner, if the wife, widow, &c., shall make default therein after the death of any such officer,—the Court of Sewers may then, under the hands and seals of any six of them, order a constable or other peace officer, with assistance if necessary, to enter any such houses, &c., in the day time, and remove the persons found therein, together with their goods, out of the premises, and take possession thereof, and of all other property belonging to the commissioners, and put their officer or servant in possession thereof.

A very general power of remunerating officers (and witnesses are included) is given by 3 & 4 Will. 4, c. 22, s. 16. It is enacted, that any Court may, out of the taxes, &c., raised under the commission, allow to clerks and other persons employed by the Court, and also to witnesses attending to give evidence before the Court, either in support of any presentment or order of the Court, or in opposition thereto, such sum, from time to time, for their several expenses and loss of time, as to the said Court shall seem just, and also all costs, &c., incurred in surveying, measuring, planning, and valuing the lands and hereditaments, or otherwise preparatory to or in or about the making, collecting, and expending such taxes, &c., or the hearing of objections to the same, or in or about the carrying on of any litigation or controversy arising out of the duties imposed on the Courts of Sewers, and for the payment of all other necessary allowances, charges, and expenses of putting the acts concerning sewers into execution, and of working the commissions (t).

As this enactment partakes partly of the old legislation, with reference to the payment of officers, and partly of new, as far as

* Houses, buildings, lands, flood-gates, sluices, dams, works, materials, tools, implements.

(t) See 4 & 5 Vict. c. 45, ss. 1, 2, 3.

the remuneration of witnesses extends, the words used are, "he it enacted and declared," the declaratory part referring, of course, to the old provisions.

Moreover, by the 48th section of this statute, every clerk, treasurer, collector, receiver, or other officer of sewers shall, upon demand, give an account in writing, and deliver proper vouchers to the Court, or to some person authorized by them, of all their receipts and disbursements, and any balance in the hands of the officer shall be paid to such person as the Court shall appoint. Then, upon default upon the part of such officer, either by a wilful refusal by, or neglect or refusal for fourteen days after notice from the Court, in which default the non-delivery of all books, writings, &c., is included, the Court may cause all arrears to be levied by distress and sale, rendering the overplus (if any), after deducting the costs of the distress. If sufficient distress cannot be found, or if the officer gives a wilful refusal, or is guilty of wilful neglect, an order of committal may be made by the Court to any house of correction or common gaol within their jurisdiction. And the officer may be there confined without bail or mainprize till he shall have given a true account, and shall have delivered up the vouchers, and paid the balance (if any) in his hands, or until he shall have compounded with the Court in respect thereof, and paid the composition, or until he shall have delivered up the books, &c., or have satisfied the Court concerning them. Nevertheless, the term of imprisonment in the case of a committal for want of sufficient distress shall not exceed six calendar months.

Bond.

It is customary for the commissioners to require a bond from the collector of the rates, conditioned to render a faithful account of the money received, by virtue of the assessments. A case occurred not long since, in which it was contended on behalf of the defendant, a surety for the collector, that newly-appointed commissioners could not recover a sum of money received by virtue of an appointment under a former commission. The condition of the bond was to render a just and faithful account of all sums of money *already collected, got in* and received, or which should at any time thereafter be collected, and pay over the money so already got in, &c. The cause was

referred to arbitration under an order of *nisi prius*, and the arbitrator awarded 1,300*l.* in respect of the breaches of the condition; and it was moved to set aside this award, on the ground that the arbitrator had included 392*l.* 10*s.*, the arrears of a former rate, received by the collector before the issuing of the commission under which the plaintiffs acted. H. had been collector for thirty years before May, 1826; and in January, 1826, the commissioners made a rate, and delivered the rate-book to H. in February, with a warrant to collect it; 392*l.* 10*s.* were collected under this warrant in February, 1826. Between 27th May, 1826, and 6th July, 1826, H. accounted for and paid that and other money to the treasurer of the commissioners, by a check on his banker, and he specifically appropriated that sum to the collection which he had first made under the rate of 1826, before mentioned. It was urged by the surety, the defendant, that the collector had no power to make this appropriation; but that the sum of 392*l.* 10*s.* ought to be applied to the payment of the money received under the new rate, and in respect of which, it seems, there was a default. But the Court held, that the arbitrator had done right in awarding the larger sum, for the nature of a commission of sewers is to be permanent, although the personal authority be but temporary. Commissioners are in many respects analogous to a corporation. If a rate be not wholly collected and accounted for before the issuing of a new commission, it is to be collected after the new commission, and must be paid to and applied by the persons acting under the new commission; the trust, the benefit, and the object, still remaining unchanged. It was true, that a bond might be so confined in its language as to apply only to the collecting and accounting for a rate made under the commission in force at the time of the appointment. But the Court held, that the bond before them could not be so narrowed in its construction; for the condition spoke of "rates which *shall be given*, of money *already received*, or to be *hereafter* received by virtue of *any* rate." It appearing clear, therefore, to the Court, that the whole frame of the bond plainly showed that it must be intended to comprise the sum in dispute, the rule for setting aside the award was discharged (*u*).

(*u*) *Saunders and Others v. Taylor*, 9 B. & C. 35.

So, where an exception was made to an order of commissioners, concerning money received by the defendant, as treasurer, in 1646, because it appeared judicially that the commission had elapsed, being in another king's name, the Court overruled the objection and awarded a *procedendo*. For although new commissioners cannot go on where the others have left off, yet they may resume the old matters; and in this case, the Court also held, that although the commissioners might apply to equity, yet that they might proceed in the King's Bench if they pleased. A feigned issue, however, was subsequently granted on the application of counsel (*v*).

And now by 3 & 4 Will. 4, c. 22, s. 50, the Court of Sewers may take security from every treasurer, &c., and other officer, for the just execution of their duty, *i. e.*, by bond to the clerk of sewers. And, in case of forfeiture, the Court may sue upon the bond in the name of their clerk, and carry on the suit at the cost of the fund protected by the security, saving harmless their clerk. And the suit shall not abate by the death, resignation or removal of the clerk, or by the expiration of the commission of sewers in question.

Similar provisions are to be found in the stat. 11 & 12 Vict. c. 63 (*x*).

By the 39th clause of that statute, the local board shall take security from their officers for the faithful execution of their duties, and for duly accounting. The act further directs, that monies received shall be paid over to the treasurer within seven days, that a list of defaulters shall be furnished, and that a perfect account, together with proper vouchers, shall be rendered. In default, or if he do not deliver up all the papers, &c., within five days after demand made, the officer may be proceeded against before two justices summarily, and committed, without bail, till he has rendered his account, or given up the books, &c.; and if default be made as to the payment of the monies, the proceeding may be before two justices by distress, and if there be not sufficient distress, the person may be

(*v*) *Rex v. Pratt*, 2 Keb. 180, 220.

(*x*) The reader is referred also to 21 & 22 Vict. c. 98.

committed for three months without bail, unless such monies be sooner paid. The proceedings, however, may be by warrant, if oath be made that the offender is likely to abscond. Then, within twenty-four hours after his apprehension, the defendant must be brought before a justice, who will use his discretion either to discharge or to detain the defendant till he can be brought before two justices, at a time and place to be named in the order; but bail for his appearance before two justices may be accepted. And no surety shall be released from his liabilities by reason of any such proceedings.

Constables are, moreover, under the necessity of obeying the orders of commissioners. This obedience is enforced by the stat. 3 & 4 Will. 4, c. 22, s. 52. And it seems, that a refusal or neglect to obey the commissioners will incur the penalty of fine by the Court of Sewers, or that an indictment may be preferred against the party refusing or neglecting his duty in this respect. Constables.

It is evident, therefore, from the instances above mentioned, that the officers of sewers are very much under the control of the commissioners, and are fully open to punishment where their conduct deserves it. Of the power of fining we shall speak somewhat more at large presently, when we come to mention the various punishments which commissioners are empowered to inflict.

Having now mentioned the Courts of Commissioners of Sewers in general, we call attention to another jurisdiction. It is that of the Board of Health, divided into the General and Local Boards. The 11 & 12 Vict. c. 63, is the statute upon this subject.

By sect. 5, the General Board of Health is authorized to appoint certain officers, as, for instance, a secretary and clerks, and servants; who are, however, to be removable at pleasure. They are also to have a seal, so that any document, or copies thereof, signed by any two of the board, and stamped with their seal, shall be *prima facie* evidence in all Courts and places whatsoever. Superintending inspectors may also be appointed

by the general board (*y*). And by sect. 7, there shall be paid to one of the members of the general board, not being the president, and to the secretary, clerks and servants, such salaries or wages, and to the superintending inspectors such allowances, as shall be appointed by the treasury, out of any monies provided for the purpose by Parliament. The allowance of the inspector, however, shall not exceed 3*l.* 3*s.* per day, besides travelling expenses (*z*).

Moreover, the local board likewise is empowered to appoint its own officers.

By 11 & 12 Vict. c. 63, s. 34, every non-corporate local board shall hold an annual meeting, and meetings for business once in each month, and, indeed, at other times, if necessary. The board may make bye-laws with reference to the summoning, notice, place, management and adjournment of meetings, and generally as to the business of the act.*

Nevertheless, one-third of the members must be a quorum, except at Oxford or Cambridge, where seven are to be the quorum. The majority shall decide each question, and the names of those present, and of those voting, shall be recorded. And in any non-corporate district a chairman shall be appointed

(*y*) Sect. 6.

(*z*) For the mode of appointing auditors, and concerning their duties, see sect. 122.

* By 11 & 12 Vict. c. 63, s. 115, these bye-laws must be in writing, signed by five or more members, and under their seal, or under the common seal in the case of a corporation. The board may, by such laws, impose a penalty not exceeding 5*l.* upon any persons who break them, together with another penalty not exceeding 40*s.* per diem, for every continuing offence (*a*), after written notice from the board. Such bye-laws may be altered or repealed by any subsequent laws, properly signed and sealed, and these must be so framed as to allow of the recovery of a sum less than the full amount of the penalty. Still they must not be repugnant to the act, and must meet with the approval of one of the Secretaries of State, and there must be one month's notice of the intention to apply for confirmation of these bye-laws; and likewise, for one month previously to such application, there must be a copy of such bye-laws kept at the office, and open to inspection. By sect. 116, these bye-laws shall be printed and hung up in the office of the board, and copies shall be delivered to every rate-payer upon application.

(*a*) See sect. 129, as to the mode of recovery.

by the board for one year, and, whenever he is absent, the board shall appoint a chairman from those present. In case of the death of the chairman, or other change, another chairman shall be appointed for the year; and in case of an equality of votes, the chairman shall have a second or casting vote; but Oxford and Cambridge are entirely excepted out of these provisions.

By sect. 35, the local board shall provide offices, and, if non-corporate, shall provide a seal, and all documents or copies signed by five or more members, and stamped with their seal, or with the common seal, in the case of a corporation, shall be evidence in all Courts and places whatsoever.

The 36th section of the 11 & 12 Vict. c. 63, enables the board to appoint a committee to manage matters fit for a committee, but the acts of such committee must be subject to the revision of the board.

And by sect. 127 of the same act, all consents required from the local board shall be in writing, under seal, and signed by five or more members.

Next, with regard to their officers.

By 11 & 12 Vict. c. 63, s. 37, the local board shall appoint a surveyor, inspector of nuisances, a clerk and a treasurer, subject, however, to the qualifications mentioned hereafter. And, with the consent of the general board, they may appoint collectors and other officers and servants to execute the act. They may make bye-laws for the regulation of their officers and servants, and they may pay out of the general or district rate, such reasonable salaries and wages as, subject to the approval of the general board, they may think proper. Their officers and servants are removable at pleasure, with this reservation, that the appointment, removal and salary of the surveyor shall be subject to the sanction of the general board. The same person may be both surveyor and inspector of nuisances, with the approval of the general board. But the clerk is not to be treasurer, nor *vice versâ*. And this prohibition extends to

partners and to all persons in the service and employ of the clerks and treasurers respectively. The penalty for the breach of these last provisions, to be recovered, with full costs of suit, by any person by action of debt, is 100*l*.

By sect. 38, no officer or servant shall have any concern with any bargain or contract made with the board. And if such officer, &c. shall be so interested, or shall take any fee or reward besides his salary or wages, he shall be incapacitated from office or employment under the act, and shall pay 50*l*., to be recovered by any person, with full costs of suit, by action of debt.

We have already seen that these officers must find security for the faithful execution of their employments, and that they must keep their accounts in a regular manner (*b*).

There are penalties for obstructing officers.

By sect. 148, whosoever shall obstruct any superintending inspector, or member of the local board, or other officer, or shall destroy, &c. any board where any bye-law, notice, &c. is inscribed, shall be liable to a penalty not exceeding 5*l*. (*c*). So if the occupier of premises should prevent the owner from carrying the act into execution, any justice may, by an order in writing, require such occupier to permit the execution of works, provided the justice shall consider them to be works ordained by the act. In default of obedience within a reasonable time, the occupier shall be liable to a penalty not exceeding 5*l*. for every day during the continuance of such refusal (*d*). Again, if the occupier shall refuse to disclose the name of the owner to the local board upon request, or omit to do so, or misstate the name, he may be summoned by a justice to appear before him or some other justice. Then if he do not appear, or do not show good cause for his refusal, or if the omission or misstatement be proved, the justice may impose a penalty not exceeding 5*l*. (*e*).

(*b*) *Ante*, p. 152.

(*c*) See sect. 129.

(*d*) *Ibid*.

(*e*) *Ibid*.

Having thus given a short account of the constitution of the Court of Sewers, and of their officers, we may divide the subject of this chapter, namely, the proceedings of the commissioners, into two principal heads.

- I. What they may do in furtherance of the great charges reposed in them ; and,
- II. How they may compel by punishments, or otherwise, the execution of their commission.

However, before we enter upon their proceedings to compel repairs, and to destroy annoyances, which are the two grand objects intrusted to their care, it may just be observed, that, as a Court of Record, they have the means of deciding all complaints brought before them concerning matters within the immediate scope of their commission (*f*). Thus, if an assessment be laid upon any one, and the goods of B., a party not chargeable, be distrained, B. may have his action, or may prefer his complaint before the commissioners for the recovery of damages; and this, says Sergeant Callis, because "it sprung by the colour of the general power of the Court" (*g*).

So, if a distress be levied upon one person in a township, he may have process in this Court to make the other inhabitants contributory (*h*). And if more than the due distress be taken from a man, we have seen that the officer may be compelled by the Court to restore the surplus (*i*).

So, if the commissioners make an ordinance, by which certain trees belonging to B. are taken by their officers for the repair of defences, or if a tunnel be made by their order over the grounds of B., in these cases B. has a remedy in the Court for the recovery ; in the one instance, for a sufficient compensation ; and, in the other, for damages (*k*).

(*f*) 7 Com. Dig. 343 ; Callis, 217.

(*g*) Callis, 218 ; 7 Com. Dig. 343.

(*h*) Ibid.

(*i*) *Ante*, p. 150.

(*k*) Callis, 219 ; 7 Com. Dig. 343.

So, again, labourers, or carpenters, masons, &c. may recover their wages before the justices of sewers; and for the same reason, namely, that as the original cause sprang from the commission, it is there determinable as incident to the authority of the Court (*l*).

These powers have been recognized by Mr. Justice Park, who has observed, that in order to save the expense of proceedings at law, parties are enabled to sue in the Court of the commissioners, and before the commissioners, who may give immediate remedy (*m*).

But no such authority as the above is vested in the Court concerning collateral matters. As if there be a river within the laws of sewers, and a tortious act be done there by any one, by fishing, for instance, here no action of trespass lies in the Court of Sewers (*n*). Nor, again, has a party any remedy in this Court, whose lands have been overflowed by the neglect of an individual liable by prescription, or otherwise, to repair his bank (*o*).

To make
laws and
decrees.

These points of jurisdiction having been explained, it is necessary to observe, that in the prosecution of this undertaking, commissioners are especially empowered by the statute of Hen. 8 to make laws, ordinances and decrees concerning the matters entrusted to them, and also to repeal laws according to their discretion; and new laws are to be ordained only for the making of new defences, or the abolition of annoyances, and for the continuation of the ancient walls, &c. (*p*), whereupon Mr. Sergeant Callis observes, that great caution is necessary before an order be made for the destruction of an old defence maintained by prescription or tenure, because the liability to repair will shift considerably upon the erection of a new wall, the level generally, and not the particular individual, being in that case responsible (*q*).

(*l*) Callis, 219; 7 Com. Dig. 344.

(*m*) 8 Taunt. 629.

(*n*) Callis, 218.

(*o*) Ibid.; 7 Com. Dig. 344.

(*p*) Callis, 282, and their orders are to be in English, and not in Latin.
1 Sid. 78.

(*q*) Id. 283, 288.

Of the validity, and the continuance or duration of these laws, enough has formerly been said (*r*), and also that commissioners are not bound to follow the laws of Romney Marsh; and, moreover, that whatever decrees may be made, they must be according to law and justice; and, therefore, we proceed to other parts of our inquiry.

The first act after survey, towards the accomplishment of necessary repairs, or the demolition of nuisances, seems to be the summoning of a jury (*s*), in order that a due presentment of the matter in question may be made. The statute of Hen. 8 declares, that the sheriff shall cause to come before the commissioners, or six of them, a sufficient jury from his bailiwick, as well within the liberties as without (*t*). And the matters to be inquired of by the jury are also declared by the statute to be the ownership of lands to be charged, the wants of reparation, and the mischiefs alleged to be common nuisances, together with the authors of the annoyances, and the names of defaulters in making needful repairs. They are also to be careful to inquire whether there be any imminent danger, and again concerning the owners of lands under obligation to repair, whether the charge has arisen by prescription, tenure or otherwise (*u*). And, lastly, their duty is to assess any amerciaments which it may be necessary to impose (*x*).

1. To summon a jury.

The jury, it will be observed, are to present persons and wants of repair generally, but not particular benefits. So that they are not to inquire into the benefit of each work, nor to present that certain parties have been benefited by such works (*y*). Two districts having been rated for the repairs of a sea-bank, and the rate having been collected by a single dike

(*r*) *Ante*, Chap. I.; and see Callis upon this subject, 281—288.

(*s*) See *post*, as to dispensing with a jury.

(*t*) 23 Hen. 8, c. 8, s. 4, commissioners may sit, and inquire by a jury on Sunday. Herne, Lect. pp. 7, 8, for judicial acts *propter necessitatem* are good on that day, and the sea is an enemy not to be repelled but by this Court. (Callis, 167, note (*b*)). And a commission of sewers need not be adjourned, *Custodes, &c. v. The Inhabitants of Outwell and Others*, Sty. 179.

(*u*) See Callis, 108—111.

(*x*) Callis, 109.

(*y*) *R. v. Tower Hamlets Commissioners*, I B. & Adol. 232.

reeve, the commissioners of sewers appointed two dike reeves, one for each district, and rated each district exclusively for the repairs of the bank, without any presentment of a jury. Cattle having been taken as a distress, it was held that trespass lay against the commissioners (z).

The omission of a statement upon the face of proceedings of commissioners that the want of repair had been found by a jury was a fatal omission (a).

The chairman at sessions intimated to the jury his ignorance of the law concerning a presentment for the non-repair of a sea-wall: here the Court granted a *certiorari* to remove the presentment (b).

Twelve.

Under the old law presentments must have been made upon oath, and upon the oaths also of twelve men; for where a return was made generally, without mentioning the number of persons, the Court held it invalid, for the presentment might have been made by two or three only, instead of twelve (c).

But by the statute 3 & 4 Will. 4, c. 22, s. 11, the number of jurors is augmented to eighteen. By that section, the sheriff, bailiff, or other returning officer of every county at large, cinque port, city, town, liberty, precinct, or place within the limits of the commission, may be commanded by warrant or process under the hands and seals of any six commissioners to impanel, summon, and return, at such time and place as shall be therein expressed, a jury of not more than forty-eight, nor less than eighteen persons usually summoned on grand juries at sessions. The persons summoned must thereupon appear at the Court of Sewers or at some adjournment thereof, as directed, and attend accordingly till discharged by the Court. They must be sworn in open Court, and charged by the commissioners to make their inquisition, and return their presentments. They must then proceed in their inquiry in open Court, upon evidence given

(z) *Wingate v. Waite*, 6 M. & Wels. 739.

(a) *R. v. Mathias*, 2 Jur. 13.

(b) *Anon.*, 1 Jur. 151.

(c) Mar. 198. See *Madd. Firm. Burg.* 84, discharge of fines for a defect in the presentment by a jury in Somersetshire.

either upon oath or affirmation, according to the rule observed in Courts of common law. Further, the commissioners may summon before them all clerks, keepers, bailiffs, engineers, surveyors, collectors, expeditors, and other their inspectors and officers of sewers, and such other persons as they may think fit. And notice of the time and place of taking such inquisition shall be affixed to the principal door of any church and chapel in the several parishes, &c., in which the rivers, &c., and works shall lie, be, or arise; or if there be no church, upon some conspicuous place in such parish, &c., in the form of a printed or written paper. The notice, in either case, must be signed by the clerk seven days at least before the inquiry, and it must be inserted seven days previously to such inquiry once in the least in one or more of the newspapers published or circulated in or near to the limits of the commission under the authority of which the inquisition shall be taken.

This section sets at rest the difficulty which used to prevail as to the summons of the jury from the body of the county. For now such a jury may be summoned as are competent to serve upon grand juries at the Court of Sessions of the peace.

Before this new act of Will. 4, it seemed to have been understood that juries should come not exclusively from the districts where the breaches, or mischiefs exist, but from the body of the county. Thus, where a presentment had been made by a standing jury returned by the sheriff from certain parishes or districts at the commencement of every new commission of sewers, and composed of landowners who were interested in escaping the general charges of the land, it was held to be void. It appeared, moreover, in this case, that the foreman alone was summoned by the sheriff on each particular occasion, and that the foreman then convened the rest of the jury; and again, that, after the jury so summoned had met, instead of presenting their inquiries before the commissioners, by bearing evidence on oath, they went out all about the country, and upon information thus carelessly picked up, they were afterwards to make their presentments. And the circumstance of the presentment of this jury having been traversed, and the trial had before another jury properly summoned from the body of the county,

From whence
summoned.

was considered to make no difference. For the act requires, that the presentment should be made by a disinterested body returned by the sheriff, and not by a body altogether alien from the jurisdiction. That being so, the defect might be taken advantage of as well after verdict as before, and no consent of parties can give jurisdiction, where none is given by law. The whole proceeding was thus adjudged to be irregular, and the presentments and other proceedings complained of were accordingly quashed (*d*). Upon a subsequent occasion, a presentment of jurors of the same county was objected to as invalid, for the want of a due summons by the sheriff, and it was intended, notwithstanding the former decision, to insist, first, that a decree founded by actual survey by the commissioners, and the presentment of the standing jury, was the judgment of the Court of Record, and that the defect of the summons could not then be inquired into. Secondly, that the jurymen had all been originally selected by the sheriff, summoned by him, and sworn upon the same jury, and that it appeared by the return, that in consequence of the sheriff's precept delivered to the foreman, they were by him summoned to appear before the commissioners of the Court of Sewers, by which the decree was made. But the Court adverted to a preliminary point concerning the duration of the commission, and which has already been mentioned in the first chapter, and the difficulty upon the point having proved too serious to be overcome, it did not become necessary to enter into the validity of the summons. The return to the mandamus, therefore, which had been issued against new commissioners, in order to compel them to execute a decree of their predecessors, was, therefore, held good. It had been the intention of the new commissioners to have resisted the old decree, on the ground of the invalidity of the summons of the presenting jury (*e*). Upon another occasion also, this doctrine, that the jury should be duly summoned by the sheriff from the body of the county, was fully sustained. The defendant justified in trespass under the commissioners for the Tower Hamlets. In order to satisfy the requisition of the statute of Hen. 8 concerning the presentment,

(*d*) *The King v. The Commissioners of Sewers for the County of Somerset*, 7 East, 71; 3 Smith, 105.

(*e*) *The King v. The Commissioners of Sewers for the County of Somerset*, 9 East, 109.

namely, that it should be made previously to an assessment, the defendant tendered the precept of commissioners to the sheriff of Middlesex, for the purpose of summoning a jury, and it appeared thereby, that the sheriff had been directed to summon a jury "resident within the Tower Hamlets." It was upon this objected, that the summons ought to have been from the body of the county, and, consequently, that the rate was bad. It was answered, that the statute contained the words "place or places," as well as "shire or shires," and that the commissioners were authorized to procure a summons of the jury from the immediate district for which they were to act; the statute, moreover, adding the expression, "where such defaults or annoyances be." But by Lord Tenterden, "the words 'place, or places,' in the acts are analogous, according to the common construction of acts of Parliament, to the words 'shire, or shires,' which immediately precede them." The learned Chief Justice added, that he felt strongly, as then advised, that the jury should come *de corpore comitatus*, that the commissioners had no power to limit the district whence the sheriff should return the jury; that he might return whom he pleased, but ought not to be confined in his discretion. The plaintiff accordingly had a verdict, the precept being illegal, and the rate, together with the consequent proceedings, bad (*f*). This case was relied upon in trespass *de bonis asportatis* against commissioners of sewers, where the sheriff had summoned the jury from a particular hundred. But as the precept was to summon *de corp. com.*, the Court of Exchequer came to the conclusion that summoning from a particular hundred was the most convenient way of executing the precept in the particular case (*g*). In a case, reported by Styles, it was urged, that certain presentments, upon which an order for an assessment was grounded, were void, because they were made by three juries of several hundreds, whereas the level to be repaired did not appear to have been within any of the hundreds from whence the juries came, so that they had no authority to inquire; and the Court held, that the commissioners had exceeded their powers in making the tax; "therefore," said the Chief Justice (Roll) "let there be a new law made by consent, and quash

(*f*) *Birkett v. Crozier, Moo & Malk.* 119; 3 C. & P. 63.

(*g*) *Taylor v. Loft*, 22 L. J., Ex. 131; 8 Ex. 269.

the presentments" (*h*). This case in Styles was cited in the first case above quoted from East, in support of the limited summons; but Lord Ellenborough, without overturning it, said, that in the case referred to from Styles, "there was no question but that the jury were to be returned by the sheriff" (*i*).

A point of considerable importance concerning these juries is next presented to us, namely, that the liability to serve as jurymen at the sessions of sewers, cannot be discharged without an express provision for that purpose. Thus, where the lands, which had been previously subject to the general jurisdiction of commissioners of sewers, were placed by a local act in the hands of particular commissioners, for the purposes of drainage, sewage, &c., it was contended on behalf of the inhabitants of that particular district, that the local statute had discharged them from their previous obligation to serve at the sessions of sewers. But the Court of Exchequer not only held, that the liability of these inhabitants continued, there being no express provision to exempt them, but refused also to discharge the estreats of fines imposed at the sessions, and levied on the inhabitants for their refusal to attend when summoned (*k*).

However, the Legislature has contemplated the circumstance of a difference of opinion between the jurors of a mere general jurisdiction, as of a county, and those of a minor jurisdiction, in cases affecting property being partly in the county at large and partly in the minor jurisdiction. And, accordingly, by 3 & 4 Will. 4, c. 22, s. 12, if, in the judgment of the Court, such opposite conclusions shall be arrived at by different juries, or opposite presentments be made under such circumstances, the Court may issue a warrant as well to the sheriff, &c. of the county at large, as to the sheriff, &c. of the minor jurisdiction, commanding them to summon and return a jury; and although out of his jurisdiction, such sheriff, &c., shall impanel, &c., as in the warrant is expressed, a sufficient number, not exceeding eighteen nor less than nine persons within his jurisdiction, and not having composed part of the juries which have differed as

(*h*) *Custodes Libertat. &c. v. The Inhabitants of Outwell*, Sty. 184, 191.

(*i*) 7 East, 80.

(*k*) *Ex parte Owst and Another*, 9 Price, 117.

aforesaid, and out of each panel so to be returned, the names of nine persons shall be drawn by the clerk of sewers or his deputy after the manner adopted upon trials in the Courts at Westminster. The eighteen jurymen so drawn shall be sworn, and shall make their presentment as though the matters in question were inquired into by a jury of the county, or a jury of the lesser jurisdiction respectively.

Moreover, a presentment need not be made upon every occasion of repair, provided there has been an original presentment. For, doubts having been entertained upon the subject, it is enacted by 3 & 4 Will. 4, c. 22, s. 13, that wherever a presentment has been made respecting any particular work, and that some person, body politic, &c., ought to repair the same in respect of any lands, &c.; there need not be another presentment on account of the same works, but the party shall continue bound under the same presentment, and the commissioners may direct the same to be repaired during the continuance of the commission. But by sect. 17, nothing in the act shall prevent the Court from making inquiry and presentment by jury concerning the matters before such Court, as they have been authorized by ancient custom, or to abridge or invalidate any of their powers not expressly altered by the statute. Yet, the reader will observe that the constitution of the jury is altered by the statute, and that the saving clause only refers to the matters to be inquired into, and to the powers of commissioners and not to the jury themselves. Several defaults may be included likewise in one presentment, by virtue of another clause of this statute (*l*). There needs not to be a second presentment, even although the commission be renewed. A presentment made concerning a work in 1819, and confirmed in 1837, by the new commission, was held binding, and the rates flowing from it were deemed valid (*m*). But it seems that the order of sewers must be confined to the original presentment. Thus, A. was presented as owner to do certain repairs. They were not done. B. then became owner, and presentments were made against him, and orders under them. But the Court made the rule for quashing these proceedings absolute, for the commissioners could not,

(*l*) Sect. 46, *post*.

(*m*) *Taylor v. Loft*, 22 L. J., Ex. 131; 8 Ex. 269.

during the same commission, proceed against a subsequent owner. And it is doubtful whether there must not be the intervention of a jury, or a personal survey by the commissioners or their official surveyor, to warrant such orders (*n*).

However, a great revolution has taken place with regard to juries. For by 24 & 25 Vict. c. 133, s. 33, commissioners may dispense with presentments by juries, as to works, rates, or anything they might but for this section have made with such presentment, subject, nevertheless, to an appeal by any aggrieved party (*o*). But it is observable, that the presentment by jury is not done away with, and it may be wiser and better for commissioners to require the old presentment upon many occasions, than to act with too great a latitude under this clause.

By 4 & 5 Vict. c. 45, s. 7, the Court may order any juryman such allowance for his loss of time and expenses as they may think fit, and such allowance is to be paid out of the sewers rates.

Jurors are fineable by the commissioners in cases of misconduct: as if there be a refusal by one or more to make a presentment when required by the commissioners, or if a juryman depart after having been sworn, or before he be sworn, if his appearance be recorded (*p*).

Surveyor's
presentment.

It may be added here, that a surveyor appointed under the laws of sewers may upon some occasions make a presentment. This is called by Mr. Sergeant Callis a supplemental presentment; for the surveyor cannot make an original presentment; but if any one neglect to repair, in conformity to the order of commissioners, after the first presentment by jury, the surveyor may, after survey, present the non-repair (*q*). His oath, on this occasion, is called an "oath of assistance," since, by giving notice to the justices of the omission, they may cause a greater amercement to be imposed (*r*).

(*n*) *R. v. Warton*, 2 Best & Sm. 719; 31 L. J., Q. B. 265; 9 Jur. (N. S.) 325.

(*o*) Sect. 47.

(*p*) Callis, 175.

(*q*) *Id.* 111.

(*r*) *Ibid.*

Further, this latter presentment by the surveyor is said not to be traversable (*s*); but a presentment by a jury may certainly be traversed; and herein the Court of Commissioners may be resembled to a sessions of the peace (*t*). Thus, where one was presented for not repairing a bank or wall, he is said to have come in, and to have pleaded a plea before the commissioners (*u*). And another case is cited by Callis, where presentments for nuisances in the river Lea were traversed (*x*).

Present-
ments—
what tra-
versable.

But the traverse must be made before the decree of the commissioners, because the decree is the final judgment of this Court, and cannot be traversed or tried by a jury (*y*). Therefore, if a decree have passed against any one who feels himself aggrieved, his course must be to prefer a bill of reversal, in like manner as the practice is in the Court of Chancery (*z*).

Several defaults may now be included in one presentment, and there may be to each a distinct traverse. The preamble of the 46th section of the stat. 3 & 4 Will. 4, c. 22, states, that in many cases the burden of repair of a common sea-wall, bank, &c., may be divided among divers persons, each of whom may be liable to the repair of a certain portion thereof. And then, in order to avoid the necessity of presenting each of such persons separately in respect of the non-repair of such common sea-wall, &c., it enacts, that any sewers' jury, bailiff, surveyor, expeditor, or other person, may present the whole of such sea-wall, &c., or any part thereof, which may require repair or cleansing, and may allege in such presentment what persons, or bodies corporate, are liable to the repair; and may also specify what part of such sea-wall, &c., each such person, &c., is bound or liable to repair, without making a separate or distinct presentment. And

(*s*) Callis, 111.

(*t*) *Id.* 215.

(*u*) Godfrey's case, Callis, 216. A presentment for not repairing *ratione tenuræ* is void, if he do not set out where the lands lie; 5 Hen. 7, 3; Callis, 182.

(*x*) Callis, 216, citing 19 Ass. pl. 6. And see Commissioners of Sewers v. Wilmore, 2 Keb. 137. The names of every person benefited need not appear in the presentment; where the presentment found "all Fore street" to be benefited, it was deemed sufficient. Warren v. Dix, 3 C. & P. 71.

(*y*) Callis, 216; 7 Com. Dig. 350.

(*z*) Callis, 217.

upon twenty-eight days' notice of such presentment, to be left with or at the last or usual place of abode or office of such person, &c., each such person, &c. shall be at liberty to traverse the allegation contained in such presentment as to the liability; and trial of such traverse shall thereupon be had, as if such presentment had been solely and exclusively made against such person, body politic or corporate, so traversing the same as aforesaid.

Repairs, &c. Having obtained the presentment of a jury, or having dispensed with it under 24 & 25 Vict. c. 133, the commissioners are enabled to proceed in the accomplishment of their chief duties, and to make their decrees for repairs, or removals, as they see fit. And, further, they then become in a condition to require statute duty, to take labourers, workmen, &c., for the purposes of their decrees, paying them reasonable wages, and also such timber, &c. as may be wanted, upon making the proper compensation for the same (*a*). These powers, however, having been set forth fully in a former page, we need not descant further on them here (*b*).

Assessments. Having ascertained the cost of the work to be done, the next proceeding is, to compel those who are individually bound to perform their obligations, and with regard to the level, to cause all necessary undertakings to be completed, making a rate or assessment to meet the expenses incurred. Some general observations remain to be made concerning the mode of directing this assessment. Notwithstanding the full discussion of, and the numerous questions which have arisen upon this subject, as we have seen in the last chapter, it seems that, as a general principle, no more is required of commissioners, than that they should lay a fair and impartial tax upon each level, and upon each person in the level, in respect of the land or taxable profits enjoyed by the visible owners or occupiers.*

(*a*) See 8 Taunt. 629.

(*b*) See Chap. II.

* For if the occupier be not liable for the whole, the commissioners may relieve him upon proof. (7 Com. Dig. 344.) So if a tax be set on lands, the owner may come and satisfy the commissioners that another has a common or rent therefrom, upon which the commissioners will lay the charge accordingly. (Callis, 143.)

By 3 & 4 Will. 4, c. 22, s. 14, it shall be lawful for the said commissioners to make separate and distinct rates, as occasion shall require, for every separate and distinct level, valley, or district, or any part of such level, valley, or district, within their respective commissions, and to fix and specify the limits of every such level, valley, or district, or of any such part of a level, valley, or district, and to appoint surveyors, collectors, treasurers, expeditors, and other officers, for every such level, valley, or district, or any part thereof respectively, whenever the said commissioners shall think fit so to do, and to cause separate and distinct accounts to be kept of all monies collected and received by virtue of any rate or rates which shall be made, under the authority of the said recited acts relating to sewers, or of this act, upon any lands or hereditaments within any such level, valley, or district, or any part thereof respectively, and of all payments and disbursements in respect thereof; and the said commissioners are hereby authorized to apply the monies to be collected and received from each distinct level, valley, or district, or any part thereof respectively, by virtue of any such rate or rates as aforesaid, to and for the several purposes to which the same may be lawfully applied under the authority of the said recited acts, or of this act, but so, nevertheless, that each level, valley, or district, and every part of such level, valley, or district, shall bear its own costs, charges, and expenses; and in case any such costs, charges and expenses shall apply to or be incurred in respect of two or more levels, valleys, or districts, or parts thereof respectively, the same shall be apportioned and divided between such levels, valleys, and districts, or such parts thereof respectively, in such manner as the said commissioners shall judge to be fair and equitable.

Nevertheless, by sect. 15, nothing shall extend to discharge any person or body corporate from any liability *ratione tenuræ*, frontage, prescription, custom, covenant, or grant; but in case of non-repair by such persons, &c. of any walls, banks, sewers, &c., and notice from the surveyor, dike reeve, or other officer, to repair, the officer of sewers, such notice being disregarded, may do the repairs; and the person, or body politic, so liable, shall bear the expenses thereof. The 18th section apportiones rates between outgoing and incoming tenants. Thus, the occu-

pier shall be liable to pay the scot or rate in proportion to the time of his occupation, and the person removing shall pay in like manner. And there shall be the like penalty of distress, although the one had not removed, or the other had been originally rated. In case of dispute, the Court of Sewers shall settle it. Provided always, that no outgoing tenant shall be entitled to have or claim any larger amount of rate than shall have been actually paid by him, and not repaid by his landlord.

Upon each
person.

Upon each person: that is, not in respect of his person, but of the lands which he holds, for there must be an *occupier* deriving advantage. As in the case of Chelsea Hospital. And although the commissioners of the Hospital had traversed the presentment, and lost a verdict upon it, this did not afford a ground of estoppel against them; but they were held justified in maintaining an action of trespass against the collector. The jury had found that a part of their property was rateable, and they had presented the part liable to be charged (*c*). So, again, in the case of the Westminster Bridewell. The governor's house could not be rated; and as the principle concerning beneficial occupancy interposed itself, the part occupied by the turnkey, matron, and prisoners, which composed the residue, was equally exempt, as those persons were not beneficial occupants. Yet the building derived benefit from the sewerage, and the powers of commissioners of sewers are saved by the act (*d*). And although usual, it does not seem absolutely necessary to name the owners or occupiers; for in a case where equity was prayed, to relieve an officer of sewers, the lord chancellor took occasion to observe, that if not naming the owners would make the assessment void, there would be an end of all assessments of commissioners of sewers (*e*). So, where an order of sewers was made for levying nine pence per acre on one

(*c*) *Neave v. Wrather*, 3 Q. B. 984; 3 Gale & D. 221.

(*d*) *Tracy v. Taylor*, 3 Q. B. 966; 3 Gale & D. 14.

(*e*) 9 Mod. 95. It is, indeed, said, that the person to be assessed must be designed in certain (*Callis*, 128, note (*a*)), and there is a case in *Styles*, where *Roll, C. J.*, said, that a tax upon the land of such an one and his assigns was not good (in *Whitley v. Fawsett*, *Sty.* 18), but by denoting the portion of land distinctly on which the tax is assessed, the person seems to be sufficiently pointed out, because the occupier of that land, whoever he be, must be the party charged, and the tax mentioned in *Styles* was upon one *and* his assigns, which made the matter uncertain. Nevertheless, it is customary, and is certainly prudent, to name the individuals assessed.

thousand three hundred and twelve acres, to be paid to the defendant, and to be applied towards the defraying of charges in and about the execution of the commission, it was objected, that the tax ought to have been on the occupiers; but the Court held the order good, and also, that the rate was well made to reimburse charges, according to the express power given by the statute, and the order was confirmed (*f*). And it is no objection to allege, that there has been no presentment by a jury of the work in respect of which such charges were incurred (*g*).

So, likewise, the same rate was held good for the reimbursement of previous law expenses (*h*).

And it was deemed sufficient to set out the names of the occupiers, and their rentals (*i*). But where a rate was imposed upon pieces of land, some of which the plaintiff in replevin neither owned nor occupied, and the demand and distress were for the aggregate sum, Lord Campbell said, that the rate was null and void, and judgment was given for the whole of the money levied (*k*).

Although this tax is directed to be laid upon the number of acres (*l*), yet the commissioners need not inquire of the value of every acre; if they ascertain the general value of the property belonging to each person, and rate him accordingly, it is sufficient. On one occasion, the defendant justified a distress for an acre tax, and the Court conceived it to be unnecessary to be so particular as to each acre, and not to be the fit mode of assessment; nevertheless, on the return of the orders of *certiorari*,

In respect
of the lands,
&c.

(*f*) Case of the Level of Hull, 2 Str. 1127; *R. v. Tower Hamlets Commissioners*, 1 B. & Adol. 232.

(*g*) *R. v. Tower Hamlets*, *supra*.

(*h*) *R. v. Tower Hamlets*. In this case also the words "works done, or to be done," were held quite capable of being read "works done *and* to be done."

(*i*) S. C.

(*k*) *Tucker v. Maitland*, 24 Law T. 111. No opinion was given on the other point: *i. e.*, 1. The rate was made for a district which had not been constituted a sub-division or smaller level under 12 & 13 Vict. c. 50; 2. It was not only made for sea-banks, but also for costs incurred in opposing the plaintiff's traverse, in which he was defeated. *Hurrell v. Wink*, 8 Taunt. 369, and *Warren v. Dix*, 3 C. & P. 71, were cited.

(*l*) See *Brungy v. Lee*, Sty. 178.

they said, that the commissioners must determine the matter, for that they could not do so; and a *procedendo* was awarded (*m*). Therefore, it follows, that a general assessment on all lands, from such a place to such a place, would be a wrong mode of proceeding, and it was so held by Lord Chancellor Parker; and he declined to relieve an officer of sewers who had exposed himself to actions at law, in consequence of the illegal charge above mentioned (*n*). And thus, also, an assessment upon a township is irregular, unless there be a special custom to warrant such a tax (*o*). Although, for the purpose of raising contingent expenses, but no other, we have seen, that the stat. 4 & 5 Vict. c. 45, has authorized the making and levying of a tax in gross upon any parish, township, or place (*p*). However, if a tax be laid upon a township in general, it is said, that they may afterwards apportion it amongst themselves (*q*); but it may be doubted, whether, in the absence of a particular custom to that effect, such a mode of taxation could be supported, and, unless it be afterwards apportioned, it is agreed on all hands that the assessment would be invalid (*r*). Thus, the assessment upon the level, both in the making of the decree judicially, and also in the form of entering it in the rate-book ministerially, presents a fair and impartial reckoning of the sums required from the owners or occupiers of lands; and although not absolutely indispensable, it is both customary and prudent to insert the name of the party to be charged, as well as the land in respect of which the obligation attaches.*

The rating by sewers' commissions is further established by 24 & 25 Vict. c. 133, s. 38. Generally, the commissioners may rate in respect of any act of parliament, law, or custom. 2. Where the expenditure exceeds 1,000*l.* the rate is "special," and a tax

(*m*) *Commissioners of Sewers v. Newburg*, 3 Keb. 827.

(*n*) *Bow v. Smith*, 9 Mod. 94; 2 Eq. Ca. Ab. 94.

(*o*) *Ante*, Chap. II.

(*p*) *Ante*, p. 96.

(*q*) 7 Com. Dig. 345; *Callis*, 127.

(*r*) 7 Com. Dig. 345; and see *Callis*, 122—130; 10 Rep. 143.

* The tax for keeping up embankments upon the Isle of Canvey was not allowed to the owner of lands there in calculating his amount of poor's rate. He had taken the lands subject to the liability to pay this tax. *R. v. Vange*, 3 Q. B. 242; 2 Gale & D. 476. The Licensed Victuallers' Society were held liable to the sewers' rate, *R. v. Licensed Victuallers*, 30 L. J., M. C. 131.

upon the owners of property. Without that expenditure, rates are payable by persons in respect of the same property as they are now payable. If the owner make default, the amount shall be levied upon the occupier, but not exceeding the rent due during the occupancy, and the occupier may deduct the sum, in the absence of any agreement, from the rent. The receipt from the commissioners to the occupier shall discharge the owner. The definition of "owner" is thus given:—In assessing, if the name of the owner or occupier be not known, the words "owner or occupier" in the rate shall be sufficient. Subject as aforesaid, and without presentment, but with the right of appeal, and a saving of agreements between landlord and tenant(s), sewers' rates may be levied, &c., as heretofore. By sect. 39, for the purpose of assessment, overseers must allow the inspection of the poor rate book, under a penalty of 5*l*.

By 4 & 5 Vict. c. 45, s. 8, on all appeals from any rates made by virtue of a commission of sewers, the Court before which it is made may amend the rate, either by inserting therein, or striking out therefrom, the name of any person, or by altering the sum therein charged on any person, or in any other manner the Court shall think just, without quashing the rate. But the Court may quash it, if they shall think that the rate should be quashed. A rate may be retrospective, unless there is anything to show a prohibition. In *replevin* the defendants avowed under a public local act. The replication was *de injuriâ*. The rate was retrospective, to pay money borrowed by commissioners under a public drainage act, and the Court held it well imposed, as there was nothing in the act to show that it might not be retrospective (*t*). Amendment
of rate.

By 21 & 22 Vict. c. 98, s. 54, whenever special district rate is mentioned in the Public Health Act, 1848, that act shall be read as if no such rate were mentioned therein. Rates under
21 & 22 Vict.
c. 98.

(s) All agreements between landlord and tenant are expressly saved by sect. 61.

(t) *Harrison v. Stickney*, 2 H. L. Cas. 108, *ante*, 76. *Parke, B.*, cited *St. Katherine Dock Company v. Higgs, ante*; and *Cortis v. Kent Waterworks Company* was cited in argument, but there the provisions of the act would not admit of its being construed so as to give validity to a retrospective rate.

..

No publication of any private improvement rate shall be required. The costs of the levy of arrears of any rate may be included in the warrant for such levy. Upon appeal or dispute, the time between the settlement or other final proceeding shall be excluded from the six months within which the rate may be made retrospectively. And notice of the demand of rates may be served as in the case of taking land under sect. 75. Then, by 11 & 12 Vict. c. 63, s. 87, the treasurer shall keep a separate account, called "The District Fund Account;" and the monies carried to such account are to be applied to the expenses of the local board not otherwise provided for. The local board may likewise levy a rate or rates, to be called "General District Rates," for defraying the expenses charged upon that rate by the act, and such other expenses of executing the act in any district as are not otherwise provided for, and not defrayed out of the district fund account (u).

The third kind of rate (which is rather by way of penalty), is called a private improvement rate.

By sect. 90, where the local board have incurred or become liable to any expenses which are declared to be private improvement expenses, they may levy upon the occupier one or more rates, called "Private Improvement Rates," in addition to all other rates, and of such amount as will discharge the debt with interest at 5*l.* per cent., within a period not to exceed thirty years, as the said local board shall direct. Should the premises, in respect of which any private improvement rate is made, become unoccupied before the expiration of the time for which the rate was made, or before it is fully paid off, it shall be a charge upon and be paid by the owner as long as the house remains unoccupied.

However, under sect. 92, this improvement rate may be redeemed before the expiration of the time by repayment of the rate, or of any part remaining unpaid.

(u) See 21 & 22 Vict. c. 98, s. 55, *post*.

By sect. 91, the occupier at rack rent may deduct three-fourths of the amount paid on account of the rate, from the rent payable to the landlord. If he hold at less than the rack rent, he may deduct such proportion of the three-fourths as his rent bears to the rack rent. Then if the landlord from whose rent this deduction is made, be himself liable to rent with respect to the same premises, and holds for a term of which twenty years are unexpired, he may deduct his proportion in like manner, and so on in succession, if there be other such holdings; provided that there shall be no deduction beyond the whole rent due.

And by 21 & 22 Vict. c. 98, s. 63, the apportionment of expenses payable by owners shall be conclusive after a notice of three months given to them of the account.

By 11 & 12 Vict. c. 63, s. 92, these special district and improvement rates might be redeemed at any time during their continuance, either by the owner or the occupier, by paying to the local board the expenses in respect of which the rate was made, or such part thereof as may not have been defrayed by sums already levied in respect of the same.

By 21 & 22 Vict. c. 98, s. 62, all expenses due from owners are declared to be charges upon the premises; and by sect. 65, all memorials under 11 & 12 Vict. c. 63, s. 120, shall be sent to the Secretary of State, who shall have the same powers as the latter act gives.

Fourthly, there is the water rate. This rate is to be levied for the purposes of domestic use, cleanliness or drainage, under the 93rd section of 11 & 12 Vict. c. 63. By sect. 94, the water rate is to be paid in advance; and, in case of non-payment, power is given to the board to stop the water, in addition to a penalty which may be incurred.

The next questions are, by whom these rates are to be paid, and upon what property they are to be assessed.

W.

N

By 21 & 22 Vict. c. 98, s. 55, the general district rates shall be made and levied upon the occupier of all property liable to the poors' rate, and to the full annual value ascertained by the last poors' rate. At the option of the board, the owner, instead of the occupier, may be rated where the rateable value is under 10*l.*, or where there are weekly or monthly tenants, or where there are separate apartments, or where the rents are collected sooner than quarterly, but he is to have the benefit of a reduced estimate of not less than two-thirds, nor more than four-fifths, but in respect of tenements at one-half.

However, the calculation is to be only one-fourth of the net annual value upon the owners of tithes, the commutation, rent-charges, occupiers of arable, meadow or pasture grounds, of woodlands, market gardens or nursery grounds, of land covered with water, or used as a canal or towing path for the same, or as a railway constructed under any act of Parliament for public conveyance. And all exemptions under any local acts are saved, in respect of general rates, within the parts to which the exemptions apply, unless a provisional order should otherwise direct. And the estimate shall be prepared before the rate is made(*y*).

A commutation rent-charge is not liable to the sewers' tax under 18 & 19 Vict. c. 120, s. 161. It is exempt under sect. 164, the practice before 11 & 12 Vict. c. 112, being to exempt the parish from the rate(*z*). Existing exemptions are to be allowed(*a*). And the rate must be allowed by the landlord(*b*). A rate under the Local Management Act (Sewerage) was held good, although it neither set out the precept of the board, nor the order of vestry. Nor was it a good objection that the order of vestry was addressed to the overseers instead of the guardians. After the heading there appeared the names of five guardians of the parish, and, at the end of the rate was the usual declaration, "We, the guardians of the poor, &c.,"

(*y*) 11 & 12 Vict. c. 63, s. 88; 21 & 22 Vict. c. 98, s. 55.

(*z*) *R. v. Goodchild*, 27 L. J., M. C. 251. Whether there be any liability? Qu. ? See s. 163.

(*a*) Sect. 164.

(*b*) Sect. 169. See ss. 175, 176.

signed by six guardians, three of whom had signed the rate. This rate was held to have been sufficiently signed (c).

By 21 & 22 Vict. c. 98, s. 56, poor rate books are to be accessible for rating under Public Health Acts.

We have seen that the private improvement rate is to be paid by the owner when the premises are unoccupied, as long as they so remain without a tenant. And by 11 & 12 Vict. c. 63, s. 93, the water rate is to be made upon the occupier also (except where otherwise provided). This rate is likewise to be assessed upon the net annual value, to be ascertained as above in the case of special and general district rates. But when several houses in the separate occupation of several persons are supplied with water by one common pipe, the houses shall be charged as if each house had been supplied by a separate pipe.

By 11 & 12 Vict. c. 63, s. 89, the general district rates may be levied for future charges, *i. e.*, prospectively, or for charges already incurred, *i. e.*, retrospectively. Should the premises be unoccupied, the owner was to pay the special rate, but there is to be no charge in respect of the general rate, although the premises are to be included in the rate. But as soon as the premises are occupied, the name of the incoming tenant shall be inserted in the rate, but he shall pay only proportionably to the time of his occupation. And again, both in the case of owner and occupier, there shall be an apportionment, if either owner or occupier cease to have an interest in the premises, and be succeeded by others, and *vice versa*.

And further, under the same section, the local board may divide any district into parts, and make a separate assessment in respect of it, which shall be in lieu of any other assessment under the act. Yet if expenses are incurred in respect of two or more parts of a district in common, there shall be a fair and equitable apportionment.

(c) *Christie, app., Guardians of St. Luke, Chelsea, resps., 27 L. J., M. C. 153.* Whether any right of appeal lay was made a query; but in *Empson v. Metropolitan Board, 25 J. P. 677*, this right was acknowledged.

In the above section we have seen, that the owner was rateable to the special rate where the premises are without an occupier. In the following cases he is also subject to the general rate. By 21 & 22 Vict. c. 98, s. 55, if the rateable value of the premises does not exceed 10*l.*, or if such premises are let to weekly or monthly tenants, or in separate apartments, the rent being payable at a less period than quarterly, the board may compound with the owner for the rates, upon such reduced estimate of the net annual value, being not less than two-thirds, nor more than four-fifths, as the board may deem reasonable (*d*). If the owner refuses, he must pay the rates assessed. In either case the arrears may be recovered by distress and sale of the goods of the owner, or of the occupier (*e*). Yet the occupier may deduct the amount from the rent due, or from time to time accruing due, unless there be an agreement to the contrary, and that shall be a sufficient discharge for the owner. Still the occupier shall not be liable beyond the rent actually due at the time, and the owner shall not be liable to any increased rate after he has compounded. Nor shall there be any alteration in the relation between landlord and tenant (*f*); so that an agreement by the tenant to pay the rate will be binding.

Other incidents to rates are, that they may be remitted or reduced in cases of poverty (*g*) or sickness; and that notice of a general rate shall be given, but no proof of such notice need be made in case of distress.

By 11 & 12 Vict. c. 63, s. 100, these rates may be inspected by persons interested in or assessed to them, together with any estimates, and copies or extracts from them may be likewise taken without fee or reward; and if any person refuses to allow of such inspection, &c., he shall forfeit a sum not exceeding 5*l.* (*h*).

If the name of the owner or occupier be not known to the

(*d*) *Ante*, p. 177.

(*e*) See 11 & 12 Vict. c. 63, s. 103.

(*f*) *Id.* sect. 97. A contract which does not comply with these provisions cannot be enforced. *Friend v. Bennett*, 4 C. B. 576; 27 L. J., C. P. 314.

(*g*) *Id.* sect. 96.

(*h*) See sect. 129.

board, such person so liable may be designated "The Owner," or "The Occupier," without more (*i*).

The 102nd section gives full powers to the local board to amend a rate in any way; and it likewise gives the right of appeal, as though the amendment had been part of the original rate (*j*).

The publication of these rates is to be the same as in the case of the poor's rate (*k*). The time and mode of payment of them are to be under the order of the local board. Fourteen days after demand the rate may be recovered by distress, after due process by summons before a justice. And again, if there be no sufficient distress within the jurisdiction of the justice who has granted the distress warrant, and it appear upon oath, before a justice of another jurisdiction, that the defaulter has goods in that jurisdiction, the justice last mentioned shall indorse his name upon the warrant, and the distress may then be levied. So if a person owing a rate quit or be about to quit his premises, without payment, he may be forthwith proceeded against by summons and distress. Where a local act gave power to recover rates in any of her Majesty's Courts of Record at Westminster, it was, nevertheless, held quite competent to sue in the County Court under 9 & 10 Vict. c. 95, s. 58, that being a later and a general act (*l*).

The 104th section refers to Schedule (D.) of the act as the form of the distress warrant. And if any constable should refuse, after having been required by a collector, to make the distress, he shall forfeit a sum not exceeding 5*l.* (*m*).

By sect. 106, the production of the rate book shall be *prima facie* evidence of the validity of the rate.

Returns must be made annually of all rates, scots, &c. (*n*). Returns.

(*i*) Sect. 101.

(*j*) See sect. 135.

(*k*) 11 & 12 Vict. c. 63, s. 103. Not of any private improvement rate, 21 & 22 Vict. c. 98, s. 54.

(*l*) *Stewart v. Jones*, 22 L. J., Q. B. 1.

(*m*) See sect. 129.

(*n*) 23 & 24 Vict. c. 51.

Appeal.

There may be an appeal against these rates. By sect. 135, the general quarter sessions next after the making of the rate, or accrual of the cause of complaint, is to be the tribunal of appeal against any rate, order, conviction, &c. A notice of fourteen days is required, together with a statement of the grounds of appeal. The decision of the Court concerning the matter of the appeal shall be conclusive, and the costs shall be in their discretion. If there be not time before the next sessions to give such notice, the next practicable sessions must be appealed to. But no grounds of appeal shall be entertained except those set forth in the appellant's statement.*

Power was given under 18 & 19 Vict. c. 121, s. 22, to construct a sewer, and to assess property in respect of it, either immediately, or by distribution over a term of years, provided that the assessment should in no case exceed 1s. in the pound on the assessment to the highway rate. The levy and the right of appeal were to be similar to the highway rate. It was held that the fourteen days' notice of appeal ran from the service of the notice, not from the time when the amount was fixed, and that the proviso limiting the annual assessment to 1s. in the pound did not prohibit the whole assessment in respect of one structure from exceeding that amount when distributed over several years, provided it did not so exceed in any one year (*n*). And this direction as to the appeal takes away the power of stating a case under 20 & 21 Vict. c. 43, s. 2 (*o*).

By sect. 136, the same power is vested in the sessions with respect to amending and quashing rates, and with respect to costs, as in the case of poors' rates. Nevertheless, though the rate be quashed, all monies may, if the Court please, be levied as if an appeal had been made, and such monies shall be deemed to be payment on account of the next effective rate. And by sect. 137, no rate shall be quashed for want of form, or be removable by *certiorari* or other process. Although presentments

* It was intended by the Legislature that a recognizance should be entered into, but, by a strange omission, the recognizance, although alluded to in the latter, is not mentioned in the former part of this section.

(*n*) *R. v. Middleton*, 28 L. J., M. C. 41; 1 El. & El. 93.

(*o*) *R. v. Newman, &c.*, Justices of Gloucestershire, 29 L. J., M. C. 117.

by jury may now be dispensed with, an appeal is, nevertheless, given by 24 & 25 Vict. c. 133, s. 47, against all orders, requisitions, or rates. The Court of Quarter Sessions may confirm, modify or annul. The time of appeal must be within four months, and ten days' notice in writing must be given stating the grounds, and must be served on the commissioners. Within four days after such service, the appellant must enter into a recognizance with two sureties before a justice, to prosecute, and abide the order of sessions. However, by sect. 48, if the question be one of account, or of engineering, or science, the Court may refer it to arbitration of one or more to be appointed by the parties, or if they cannot agree by the Court, and the award shall be enforceable as an order of sessions. By sect. 49, the 17 & 18 Vict. c. 125, shall extend to these arbitrations, and the word "Court" shall include the Court of Quarter Sessions. The 50th section provides as to the decision of questions by justices or by arbitration.

A Local Drainage Act (9 & 10 Vict. c. cxxviii.), s. 81, provided that the commissioners should assess the occupiers of certain lands with an acre tax. By sect. 84, if default were made for ten days, interest was recoverable in like manner as the rates. By sect. 85, the sums paid might be deducted from the rents, only that no more than the rent which should from time to time become due should be paid. By sect. 89, upon default for thirty days, the commissioners might levy by distress and sale. By sect. 90, the lands were to be the security for the rate. It was held, 1, that an occupier coming in after thirty days from the time of payment of the rate might be distrained on, there being a continuing default, but for interest only from the time of his coming into occupation, and in respect not only of rent due, but also of rent accruing due (*p*). It is no ground for dispensing with this rule, that the rate may have proceeded upon an erroneous principle (*q*). A. B. was presented by a jury to do repairs as owner. The commissioners during the same commission made a rate upon one who had become an owner since the present-

(*p*) *Mattison v. Hart*, 23 L. J., C. P. 108; 14 C. B. 357.

(*q*) *Metropolitan Board v. Vauxhall Bridge Company*, 26 L. J., Q. B. 213.

ment. They did this upon the evidence of the marsh bailiff without another presentment. The rate was held bad (*s*).

By 18 & 19 Vict. c. 120 (Metropolis Local Management), s. 161, the overseers of the poor of every parish to whom an order from a vestry or district board is sent shall levy the amount by separate equal pound rates, amongst others a separate rate to be called a sewers' rate. The assessment is to be upon the net annual value of the property, ascertained by the poors' rate, and the levy is to follow the rules prescribed in raising the poors' rate; and, likewise, as to appeal and excuses for poverty. Then the amount, when levied, is to be paid to the treasurer of the vestry or board. By sect. 163, the sewers' rate shall only be assessed at one-fourth part of the annual value in respect of land used as arable, meadow, or pasture only, or as woodland, orchard, market garden, hop, herb, flower, fruit, or nursery ground. By sect. 164, all property exempted or subject to reduction or allowance under 11 & 12 Vict. c. 112, shall continue to enjoy such privileges (*t*). By sect. 169, all powers on the part of tenants to deduct sewers' rates from their landlords' rents are saved, whether the tenancy have commenced before or after this act. By sect. 176, the places mentioned in Schedule (C.), and which are not now rated shall remain free, except as to contributions towards preventing the metropolitan sewage from flowing into the Thames, yet so far only as those places may be benefited. This principle of benefit prevails, but with the qualification that no reference to the amount of benefit can be permitted. If the appellants have only derived half the proportionable benefit, their case will fail (*u*).

Borrowing
money.

Commissioners of sewers may, moreover, raise money upon mortgage. And their powers are in this respect applicable to

(*s*) *R. v. Warton*, 7 El. & Bl. 964; 31 L. J., Q. B. 265; 9 Jur. (N. S.) 325.

(*t*) See sects. 166, 168, as to the recovery of such rates from parishes. And see 12 & 13 Vict. c. 93, s. 17, where annuities may be granted to satisfy mortgages in force, although the commission should be at an end, and may be enforced by rates, in the case of the expiry of the commission by the Justices of Middlesex, Surrey, Kent, and Essex.

(*u*) *R. v. Head and Metropolitan Board of Works*, 3 Best & Sm. 419; 9 Jur. (N. S.) 871; 32 L. J., M. C. 115.

new as well as to ancient works. The securities they give are transferable.

By 3 & 4 Will. 4, c. 22, s. 41, they may take up any sum for the purchase of messuages, lands, &c., or defraying the costs of any work of repair within their commission, or any new work connected with the sewers, whether a defence or otherwise. The repayment, with interest, is to be secured by a decree under the hands of any six commissioners, charging the lands of those receiving benefit or avoiding damage by reason of the works and the owners or occupiers, or owners and occupiers for the time being, with such repayment, according to the proportions and in the manner returned in and by any presentment touching the costs and charges of such last-mentioned works, or the lands, &c. receiving benefit and avoiding damage thereby. Nevertheless, the consent of the owners and occupiers, being three-fourths in value, of the lands, or of their respective husbands, guardians, &c., must be previously certified in writing. Then follows another provision, that no owner of lands shall be charged with the payment of more than one-fifth part of the value of his lands at the time of the borrowing. And further, provision is made that repayment of the borrowed money shall take place within a time to be named in the decree, not being more than fourteen years from the making thereof, by equal annual or shorter instalments and interest. The decree is to remain in force until such sums so borrowed shall have been satisfied.

By sect. 42, the Court of Sewers may grant securities, in the form of a certificate, under the hands and seals of six commissioners, to the parties advancing money. The amount borrowed, the rate of interest, the periods of repayment by instalments, and a general description of the particular lands, or, if by assessment, the district, limit, or level in which the lands are situate which are to be charged with such repayment, must appear in the certificate. The form of the security is then given, which will be found in the note.*

* "By virtue of an act passed in the third year of the reign of his Majesty King William the Fourth, intituled [*here insert the title of this act*], we the undersigned, being six of the commissioners [*here insert the general description of the commission under which they act*], in consideration of the sum of _____ of lawful money of Great Britain to [*here insert the name of the*

By sect. 43, every person, body politic, &c., and his, her, or their executors, &c., may from time to time, personally or by attorney, make a transfer of the right to the principal and interest above alluded to. The course is, to indorse upon the security, in the presence of a witness, who shall subscribe his name thereto, a form of transfer (which shall be found beneath*), and such transfer shall be produced and notified to the clerk of sewers before any principal or interest shall be received by virtue of the transfer. The clerk must then make an entry, amongst the records of the commissioners, of the particulars of the transfer, and indorse a minute of the entry of the transfer, and sign the same. And for such entry and minute he shall be entitled to a fee of 5s., and no more.

These mortgages or borrowings, it will be observed, relate to the making of works for repairs, and other defences. But there are, as we have seen, many other expenses incident to sewers(x), and a general sewers' rate is not the work of a day. It is, therefore, now permitted by the Legislature to commissioners of sewers to raise money for these contingent expenses. And therefore, by 4 & 5 Vict. c. 45, s. 4, power to borrow money for these purposes is given. And the security for repayment, with interest, is to be guaranteed under a decree under the hands and seals of at least six commissioners. The general

receiver of the district] lent and paid by do hereby certify, that [here describe the particular lands, or, if by assessment, the valley, level, or limit in which the lands are situate, which are to be charged], are become charged with the repayment of the said sum, in instalments of one part on the day of in every year, together with interest on such part of the said principal money as shall remain unpaid from time to time at and after the rate of pounds per centum per annum, until the whole thereof shall be repaid; which sum so lent and advanced by the said is part of a capital sum of which at a Court of Sewers holden at on the day of last was decreed and ordered to be taken up and borrowed for the purpose of [here briefly state the general cause or object of borrowing the money]. In witness whereof we have hereunto set our hands and seals the day of ."

* "I [or we] [A. B. of, &c.], in consideration of the sum of to me this day paid by [C. D. of, &c.], do hereby transfer the within certificate of charge, with all my right and title to the principal money thereby secured and now remaining due thereon, and to all the interest money now due or hereafter to become due unto his [her, or their] executors, administrators, successors, and assigns [as the case may be]. Given under my hand and seal this day of ."

"Witness,

(x) See *ante*, p. 97, 3 & 4 Will. 4, c. 22, s. 16.

sewers' rates, or any of them, may be charged with the payment, and the time limited for completing that payment is seven years; the payment to be made by equal annual or shorter instalments, together with interest. Then the 5th section makes similar provisions with those which have been already mentioned under 3 & 4 Will. 4, c. 22, s. 42, for the creation of securities, but as the burthen in this case is not upon the lands, but upon the rates, the certificate given must mention the particular general sewers' rate which is to be charged with the repayment. Then follows the form of the security, to which the reader is referred in the note.*

The 6th section provides for the transfer of these securities, and for the form of the transfer, with other incidents, but as these provisions are exactly similar to those of the stat. 3 & 4 Will. 4, c. 22, s. 43, which have been already set out (*y*), we will merely refer to them. So under 21 & 22 Vict. c. 98, s. 8, all sanctions, &c., of the General Board of Health as to mortgages are expressly saved.

Other powers as to mortgage are given by 24 & 25 Vict. c. 133, s. 40. Mortgages may be generally effected on the security of the rates. But 1. The sanction of the Inclosure Commissioners must be obtained. 2. By agreement with the mortgagees the borrowing may be for a time not exceeding thirty years. And if part only of a district be benefited, the borrowing and repayment shall be in respect of that part only.

* "By virtue of an act passed in the _____ year of the reign of her Majesty Queen Victoria, intituled [*here insert the title of this act*], we, the undersigned, being six of the commissioners [*here insert the general description of the commission under which they act*], in consideration of the sum of _____ of lawful money of Great Britain to [*here insert the name of the treasurer*] lent and paid by _____ do hereby certify, that the several general sewers' rates to be made and levied within [*here insert the name of the district or level*] under and by virtue of the said act are become charged with the repayment of the said sum, in instalments of one _____ part on the day of _____ in every year, together with interest on such part of the said principal money as shall remain unpaid from time to time, at and after the rate of _____ pounds per centum per annum, until the whole thereof shall be repaid; which sum so lent and advanced by the said _____ is part of a capital sum of _____ which, at a Court of Sewers holden at _____ on the _____ day of _____ last, was decreed and ordered to be taken up and borrowed. In witness whereof we have herunto set our hands and seals the _____ day of _____."

(*y*) *Ante*, p. 186.

By sect. 41, the clauses of 10 & 11 Vict. c. 16 (Commissioners' Clauses Act), shall be incorporated as to these mortgages.

Mortgage.

The rates under the Acts for Promoting the Public Health may be mortgaged by the local board.

By 21 & 22 Vict. c. 98, s. 57, the board may borrow money for the purposes of the act, and charge the incumbrance upon the rates, *i. e.*, upon the kind of rates applicable to the matters in respect of which the money is borrowed. But the mortgage shall only be in respect of works of a permanent nature, and shall not at any time exceed in the whole the assessable value for one year of the premises assessable under the act, within the district or part of it where the money is borrowed. By sect. 78 of the same act, where the cost of works exceeds one year's assessable value of the premises, the board may petition a Secretary of State to borrow or re-borrow for such works upon mortgage of the rates leviable under 11 & 12 Vict. c. 63, or this Act, an amount not exceeding two years' assessable value of the premises, to be repaid within fifty years (*z*). By 11 & 12 Vict. c. 63, s. 108, the commissioners under 5 Vict. c. 9, sess. 2 (a Public Works' Act), may advance money for these purposes, without further security than the mortgage of the rates. The 109th section gives the local board the following power. They may borrow money at a lower rate of interest than that secured by any mortgage previously made by them, and then outstanding, in order to pay off any securities bearing a higher rate of interest, and may charge the sum so borrowed at the lower rate upon the rates as aforesaid. And if the local board be not prepared to pay off the money due upon any mortgage at the time appointed, they may borrow money for that purpose upon the credit of the rates, at such interest as above in the case of other mortgages (*a*).

The 111th section speaks of the form. The deed must fully state the date, consideration and place of payment. It shall have the seal of the local board, or the common seal of a cor-

(*z*) See also sects. 79, 80, 81.

(*a*) Sect. 110.

poration, and be signed by five or more members, and it shall be framed according to Schedule (B.) of the act (*b*).

There must be kept at the office of the local board a separate register of the mortgages upon each rate, and within fourteen days after the date of any mortgage, an entry must be made in each register of the number and date, and of the names and description of the parties thereto, as stated in the deed. Every register shall be open for inspection during office hours, without fee or reward, and any clerk, having the custody of the same, and refusing to allow of such inspection, shall forfeit a sum not exceeding 5*l.* (*c*).

The 112th section enables persons to transfer their mortgages, and directs the register of transfers.

The 58th and 59th sections of the statute 21 & 22 Vict. c. 98, relate to rent-charges in respect of money advanced, and their registry.

A receiver may, in certain cases, be appointed under 11 & 12 Vict. c. 63, s. 114. Thus, if six months after any principal or interest has become due in respect of a mortgage under the act; and if, after demand in writing, the same be not paid, the mortgagee or other person entitled may, without prejudice to any other mode of recovery, apply to two justices to appoint a receiver. Upon which, after a hearing, such justices may appoint such a person to collect and receive the whole or a competent part of the rates, liable to the payment of principal and interest, until the same, with the costs of the opposition and of the collection, be paid. The rates shall then be so paid, and shall be money had and received to the use of the parties on whose behalf the application is made. But the sum due must amount to 1,000*l.* upon this occasion. It must either be due to one person, or make up that sum in the aggregate due to two or more applicants.

Again, commissioners of sewers may purchase lands for their works. Purchase of
lands.

(*b*) See Schedule (B.) at the end of the book.

(*c*) See sect. 129.

By 3 & 4 Will. 4, c. 22, s. 24, they may treat with the owners of and persons interested in any messuages, lands, tenements, hereditaments and premises, for the purchase thereof, in order to widen, deepen, strengthen, maintain, &c., any rivers, streams, &c., and defences, within their jurisdiction, and for the loss or damage which such owner, &c., may sustain by the purchase. All bodies corporate, &c., tenants for life or in tail, husbands, guardians, trustees, feoffees in trust, executors, administrators, and all other persons may contract, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of the person entitled in reversion, &c., and for or on behalf of their *cestuis que trust*, whether *femes covert*, infants, or issue unborn, lunatics, idiots, or others, and to and for all *femes covert* who are or shall be seised of or interested in their own right, and to and for any person, who is or shall be possessed of or interested in any such lands, &c., or who shall sustain any damage as aforesaid, with the said commissioners for the sale thereof respectively, or for the satisfaction to be made for the same, or for such damages as aforesaid, and by conveyance may convey unto the said commissioners all or any of such messuages, &c., or any part thereof for the purposes aforesaid, and all contracts, &c., which shall be so made shall be good, valid, &c., without fine or recovery, and shall be a complete bar to all estates tail, and other estates, &c. And all such bodies politic, &c., and all other persons are declared to be indemnified for their acts. The form of conveyance is prescribed by the 25th section, and is appended in the note beneath.*

The 26th section contemplates an unwillingness on the part

* 3 & 4 Will. 4, c. 22, s. 25. Be it further enacted, That all such conveyances of any lands, tenements, or hereditaments to be purchased by the said commissioners of sewers shall be expressed in the following or similar form of words, as the circumstances of the case may require:

"I of in consideration of the sum of to be paid by six or more of the commissioners of sewers acting in and for several limits [*here describe the limits as set forth in the commission of sewers*], do hereby grant and release to the commissioners of sewers acting in and for the said limits all [*describing the premises to be conveyed*] and all my right, title, and interest in and to the same and every part thereof, to hold to the said commissioners, their successors and assigns for ever, by virtue of the several acts and laws now in force concerning sewers. In witness whereof I have hereunto set my hand and seal this day of in the year of our Lord ."

of owners to treat. It enacts, that if any such body politic, &c., or other person interested in such lands, &c., or sustaining damages, upon notice given, or left in writing at the dwelling-house or place of abode of such person, or of the principal officer of any such bodies politic, &c., or at the house of the tenant in possession of any such lands, &c., of thirty days, neglect or refuse to treat, or shall not agree in the premises, or by reason of absence shall be prevented from treating, the commissioners or any six of them may then issue their warrant under their hands and seal, to the sheriff, bailiff, or other returning officer of the county or place where the matter in question shall lie, or, if the sheriff, &c., be interested, then to one of the coroners, commanding such sheriff, &c., to impanel, summon, and return a jury. The said sheriff, &c., is hereby required accordingly to summon twenty-four men qualified as in cases for trial at Westminster. These twenty-four persons are then to appear at the quarter sessions or at some adjournment thereof, for the county where the lands, &c., lie. Then, if twelve persons do not appear, the number of twelve shall be made up by the sheriff, &c. from other honest and indifferent persons. All persons may have their lawful challenge. The clerk of the peace, moreover, may summon all who may be thought necessary persons as witnesses, and may authorize the jury, or any six of them, to have a view. The jury shall then, upon their oaths (which oath, as well as the oath to the witnesses, the justices may administer) assess the value of the lands or matter in dispute, or the recompense for damages, and shall settle the proportions to be paid to the persons interested, upon which the justices shall give judgment for such purchase monies or recompense. And such verdict and judgment shall be binding and conclusive against all persons, bodies politic, &c.

The warrant and requisition under this section needs not to refer to the notice, nor give the particulars of the lands required, in order to invest the sheriff and jury with jurisdiction. In a case decided under a drainage act, certain lords of manors or their agents being commissioners, it was objected, that no such reference appeared in the warrant and requisition. But the Court took notice that the particulars had been furnished to the

party, that he had received due notice under the act, and that what the jury had to deal with was the compensation. They cited *Taylor v. Clements* (*d*), and refused to set aside the requisition (*e*).

By sect. 27, if any sheriff, &c. should make default he is to be fined 20*l.* for each offence. If any juryman should make default, refuse to be sworn, or give his verdict, or if any witness shall not appear, or refuse to be sworn or examined, every such offender, having no reasonable excuse, shall forfeit a sum not exceeding 5*l.* And by sect. 28, all agreements, contracts, sales, and conveyances, and also all verdicts and judgments (the said verdicts and judgments being certified by the clerk of the peace), shall be deposited with the clerk of sewers for the district, and filed with the rolls of the Court. And the same, or a true copy, shall be admitted as evidence in all Courts, and all persons may inspect them and take copies, upon paying 1*s.* for each inspection, and for every copy not exceeding seventy-two words the sum of 4*d.*, and so in proportion for any greater number of words.

There is some doubt whether the statute extends to copyholds. Still a party who has concealed from the commissioners that his land is copyhold, and has treated with them, shall not be permitted to take the objection (*f*).

In calculating the measure of damages, it would seem, that the value of the land taken, at the time of the purchase, and not the cost of restoring it to its original condition, should be the criterion for the jury (*g*).

The 29th section of this same act, 3 & 4 Will. 4, c. 22, s. 29, ordains, that in case a jury shall give a verdict for more money

(*d*) 11 Cl. & F. 610; 3 Railw. Cas. 65, where it was objected that the warrant and inquisition did not state that the owner had refused to treat, &c., nor that the company had served the notice on him. But all these necessary facts appeared aliunde, and the House of Lords held, that the sheriff and jury had jurisdiction.

(*e*) *Ostler v. Cooke*, 18 L. J., Q. B. 185; affirmed in error, 22 L. J., Q. B. 71; 18 Q. B. 831.

(*f*) *R. v. South Holland Drainage*, 8 Ad. & El. 429; 1 Per. & D. 79.

(*g*) *Jones v. Goodday*, 8 Mees. & W. 146; 1 Dowl. N. S. 50.

than the commissioners have offered before the summoning, or returning of the jury, then the costs of the jury and witnesses and all other expenses attending the hearing and determining of such difference shall be paid by the commissioners out of their fund for that purpose. Such costs and expenses shall be settled by an officer of one of the superior Courts of Record at Westminster, to be nominated in case of dispute, in Middlesex, by the Lord Chief Justice of the Queen's Bench, and in every other county by the senior Judge of the gaol delivery for the time being. On the other hand, if the verdict shall be for no more, or for less money, then the costs and expenses, to be ascertained as aforesaid, shall be paid by the party. Such costs last mentioned may be levied by distress and sale, by warrant under the hands and seals of two justices of the peace for the county or place within which such verdict or judgment shall have been given, and the surplus (if any), after deducting the costs and expenses, and the costs of the distress and sale, shall be returned, upon demand, to the owner of the goods and chattels distrained upon. If the commissioners refuse to pay, they may be compelled by mandamus.

The words "all other expenses attending the hearing," &c., are of large import, and thus are worthy of observation. For upon several occasions, where particular expenses have been mentioned in the act, the Courts have excluded other expenses not named. Here, however, is a more general provision (*h*).

Further provisions concerning the purchase of lands are enacted by 24 & 25 Vict. c. 133. By sect. 21, unless by agreement with the owner, lands cannot be taken, but recourse may be had to Parliament. The 22nd section enters upon these proceedings. It directs the mode of publishing notices before application is made to Parliament, and the serving them upon the owners, lessees, and occupiers, stating that land is to be taken, and requiring the assents and dissents, or neuters. Also the delivery, personally, or to the agent of the owner, &c.; if abroad, leaving the notice at the party's last known place of

(*h*) See *R. v. Justices of York*, 1 Ad. & El. 828; 2 Railw. Cas. 166; *R. v. Sheriff of Warwickshire*, 3 Nev. & M. 685; *R. v. Gardner*, 6 Ad. & El. 112; 1 Nev. & P. 308.

abode, or forwarding a prepaid letter to such place. These preliminaries being obeyed, the commissioners enter upon the field, presenting a petition to the inclosure commissioners as to the land, the use of it, and the Lands Clauses Act (*i*). Upon proof of these things the inclosure commissioners may either dismiss, or send an inspector to inquire concerning the petition (*k*). By sect. 25, the inspector is to give notice of the time and place of hearing. The 26th section contains the usual provisional order, subject to confirmation by act of Parliament. By sect. 27, the costs of obtaining the act shall be paid out of the rates applicable to the particular works. The restrictions being complied with as above, the commissioners of sewers may purchase both lands and easements, taking the 8 & 9 Vict. c. 18, and 23 & 24 Vict. c. 104, as incorporated with their act (*l*). Moreover, this part of the act shall be deemed to be the special act; the commissioners shall be deemed the "promoters;" and "land or lands" shall include any easement in or out of lands.

Under the Bedford Level Act, commissioners are empowered to purchase and make satisfaction for lands, and for damage, and a jury was to be summoned in case of refusal. There was a further provision that if the land owners and commissioners could not agree as to the compensation for damage, the same was to be ascertained by a jury, to be impanelled and returned as aforesaid. It was held, that in this last case the owners and not the commissioners were to apply to the magistrates (*m*).

The next clauses point out from what fund the monies are to come, and what is to be done with them. And it is observable, that the commissioners ought to pay the expenses of the investment in the funds (*n*).

By 3 & 4 Will. 4, c. 22, s. 30, every sum of money and recompense to be agreed for or assessed as aforesaid, shall be paid out of the monies which are levied on the messuages, &c., receiving

(*i*) Sect. 23.

(*k*) Sect. 24.

(*l*) Excepting sects. 16, 17, 84—91, 123.

(*m*) *Ex parte* Onslow, 3 Sim. 435; *In re* Eau Brink Drainage.

(*n*) *Ex parte* Onslow, 1 Y. & Col. 553.

benefit or avoiding damage from the works of the commissioners. Then upon payment to those persons, or their agents, or left* at their places of abode, or with the tenant in possession of the lands, &c., or into the Bank of England, as directed by the act (o), the lands, &c., shall be vested in the commissioners (p), and shall and may be taken and used for their works, and the right to such lands, &c., shall be divested out of the said persons, &c.

The next section provides for persons under disabilities.

By sect. 31, money assessed as aforesaid, and due as aforesaid, to any body politic, &c., or feoffee in trust, executor, administrator, husband, guardian, committee, or other trustee, for any infant, lunatic, idiot, *feme covert*, *cestui que trust*, or other person whose lands, &c., are or may be limited in strict or other settlement, or to any other person under any other disability or incapacity whatsoever, shall be paid as soon as may be into the Bank of England, and placed, *ex parte* the commissioners of sewers in question, to the account of the Accountant-General of the Court of Exchequer without fee or reward. And such money shall be applied, upon petition, by the parties who would have been entitled to the rents and profits of such lands, under the order of the Court of Exchequer in the purchase or redemption of the land tax, or in the discharge of any debt or incumbrance, or part thereof, which may affect the lands, &c., taken, or any other lands, standing settled therewith to the same or the like uses, trusts, intents, or purposes. And if the money shall not be so applied, then it shall be laid out under the like direction, in the purchase of other lands (q), &c., which shall be settled to the like uses, &c., as the lands taken, or such of them as at the time of making such conveyance or settlement shall be existing undetermined and capable of taking effect. In the mean time, the money shall, upon application to the Court, be invested by the Accountant-General in the three per cents. reduced; and the dividends of the stock until it be sold for the purposes

* *I. e.* The money being left.

(o) *Post.*

(p) See sects. 38 and 47, *post.*

(q) See sect. 36, *post.*

aforesaid, shall be paid, from time to time, to the person who would for the time have been entitled to the rents and profits of the lands, &c., to be purchased as aforesaid, in case such settlement or purchase were made.

By sect. 32, if the money assessed shall not amount to 200*l.*, and yet be of the value of 20*l.*, or upwards, it shall be at the option of the person entitled to the rents or profits of the lands sold for the time being, or of his guardian, &c., to be signified in writing, to have such sum paid into the Bank of England, to the account of the Accountant-General as aforesaid, and to be applied as hereinbefore directed, or otherwise to have it paid to two or more trustees nominated by himself, and approved by six or more of the commissioners of sewers interested, (the consent being signified in writing by the person and the commissioners,) in order that the principal money and dividends, &c., may be applied as hereinbefore directed, if possible, without the intervention of the Court of Exchequer.

And by sect. 33, should the sum be less than 20*l.*, then the party entitled for the time being, or the guardian or committee for the benefit of the person so entitled, shall have it.

Thus, if the party be under no disability, he shall have his money summarily under the 30th section; but if he should be affected with disability, or if a corporation should be entitled, the money must then be invested according to the provisions of the 31st and following sections. If there be any difficulty as to the title to these monies, the party in possession shall be deemed entitled to them, unless the contrary be shown to the satisfaction of the Court of Exchequer. This is provided for by the 34th section, and the dividends and capital shall be applied accordingly, unless a wrongful possession should be disclosed to the Court, and that some other person was lawfully entitled to such lands, &c., or to some estate or interest therein.

The 35th section supposes that the person in possession may, from some cause, refuse to accept the money; or that he may not be in a condition to make a good title to the satisfaction of six commissioners; or, again, that he may not be found: in

these cases, respectively, any six commissioners may order the sums assessed to be paid into the Bank of England to the account of the Accountant-General as aforesaid, to the credit of the parties interested in the said lands, &c. (describing them), subject to the order of the Court of Exchequer. The Court, upon the application of any person making claim upon petition or motion, may then summarily order the money to be laid out in the public funds, and likewise distribution or payment of the dividends, according to the estate, &c. of the person making claim, and may make any other order which may be reasonable; and the cashiers of the Bank shall give a receipt for the same to the person paying it in.

We have seen in the 31st section, that other lands may be occasionally purchased with the money arising from the sale of lands to the commissioners. The mode of dealing with these expenses forms the subject of the 36th section. Thus, where by reason of the disability or incapacity of the person or corporation entitled to any lands, &c., the purchase money is to be applied towards the purchase of other lands (*r*), the Court of Exchequer may order all reasonable expenses, with the costs of the order, to be paid by the commissioners, or any six of them, and the commissioners may reimburse themselves out of the rates under the act.

A special provision forbids the commissioners from taking without leave any house or building, or any garden, yard or paddock, or any park, planted walk or avenue to a house, or any inclosed ground, planted as an ornament or shelter to a house, or planted or set apart as a nursery for trees, or any part thereof. If consent be given, it must be in writing, and given by the owner or proprietor, or the person, body politic or corporate, authorized to sell or convey by virtue of the act (*s*).

The commissioners may not want all the land they have bargained for. In this case, any six of them, in whom the lands, &c., are vested, may sell and dispose of them either together, or in parcels. The produce is to be applied to the making and

(*r*) See sect. 31.

(*s*) See sect. 37.

maintaining of the sewers in the district. Nevertheless, the purchaser shall not be answerable for any misapplication or non-application of such money. The owner of the adjoining ground is to have the first offer, and an affidavit before a Master in Chancery, or justice of the peace, where the lands lie, by some person not interested in the premises, stating, that the commissioners made the offer, and that it was not accepted, shall be sufficient evidence in all Courts that such offer was made and refused. In case, however, of assent on the part of the person to whom the land is offered, and of a difference of opinion as to its value, the price thereof shall be ascertained by a jury, in like manner as is directed by the act, when the commissioners are the purchasers (*t*); and the expense of hearing and determining the difference shall be paid as is directed with respect to purchases made by the commissioners, *mutatis mutandis* (*u*).

The form of conveyance by the commissioners is given by the 40th section, and will be found in the note below.*

It has already been mentioned, that as soon as payment is made by the commissioners of sewers, the lands, &c. purchased by them become vested in them (*x*). So careful has the Legislature been of this issue, that other sections have renewed this guarantee in the most explicit manner.

Thus, by sect. 38 of the same statute (3 & 4 Will. 4, c. 22), upon payment or legal tender of such sum as shall have been contracted or agreed for, or assessed by juries, for the purchase of any messuages, &c., or as a compensation for losses or damages, within thirty days after the agreement or assessment,

(*t*) See sect. 26.

(*u*) See sect. 29.

* "We, six of the commissioners of sewers acting in and for several limits [*here describe the limits as set forth in the commission of sewers,*] in consideration of the sum of _____ to us paid by _____ of _____ do hereby grant and release to the said _____ all [*describing the premises to be conveyed,*] and all right, title, and interest of the commissioners of sewers in and to the same and every part thereof, to hold unto the said _____ his heirs, executors, administrators, and assigns for ever. In witness whereof we have hereunto set our hands and seals this _____ day of _____ in the year of our Lord _____."

(*x*) Sect. 30.

or upon payment of the same into the Bank of England within thirty days as aforesaid, the commissioners, their agents, servants and their workmen, may enter upon such messuages, &c., and the property in such messuages, &c. shall then become absolutely vested in the commissioners for ever. Such payment, moreover, shall bar all right, title, claim, &c., and also dower, and all estates tail, and all other estates, whether in reversion or remainder.

And by sect. 47, the property of and in all lands, tenements, hereditaments, buildings, erections, works and other things which shall have been or shall hereafter be purchased, obtained, erected, constructed and made by or by the order of, or which are or shall be within or under the view, cognizance or management of any commissioners of sewers, with the several conveniences and appurtenances thereunto respectively belonging, and also all and singular the goods, tools, utensils, materials and things whatsoever had and to be had, bought, procured or provided by or by the order of, or which are or shall be within or under the view, cognizance or management of such commissioners, shall be, and the same are hereby vested in the commissioners of sewers within or under whose view, cognizance or management such lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials and things shall respectively be, who are hereby empowered to bring or cause to be brought any action or actions, or to prefer or order the preferring of any bill or bills of indictment, against any person who shall dig up, break or pull down, damage, destroy, injure, spoil, steal, take or carry away, or wilfully and wrongfully buy or receive any such lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials and things whatsoever as aforesaid, or any part thereof; and in every such action and indictment the said lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials and things, shall be laid or described to be the property of the said commissioners, without stating or specifying the name or names of all or any of such commissioners.

The words of this section are very general, and at first sight might seem to vest all lands in the commissioners which are

..

within their view, management and cognizance. But no such issue can be allowed upon further consideration of the point, for to hold that doctrine would be to assent to the divesting of the fee simple of large estates from their owners, and vesting the same in commissioners of sewers. In a case, however, where some waste land has been taken by commissioners without purchase, it was endeavoured to obtain for the commissioners this enlarged interpretation of the statute. But the Court of Exchequer repelled the claim of the commissioners. And Lord Abinger, in giving judgment, observed, that the clause should be read thus: All lands, &c. shall be vested in commissioners after the due purchase of them; and all buildings, erections, works, &c., which are within their view, cognizance or management, shall likewise be vested in them; thus dividing the subject-matters with a regard to the grammar of the sentence. And Parke, B., added, that the effect of the act was, the lands purchased by one set of commissioners might be held also by subsequent commissioners, as a corporation. The Court gave judgment for the plaintiff (*y*).

The stat. 21 & 22 Vict. c. 98, s. 75, enables the local board to purchase lands under these conditions:—1. The Lands Clauses Consolidation Act shall be incorporated with this act. 2. Publication and service of notices. 3. A petition to the Secretary of State. 4. An inquiry by him. 5. A provisional order by him (*z*); and 6. To be confirmed by parliament. The costs, with interest, to be a charge upon the general district rates.

We have now shown the proceedings of commissioners in the fulfilment of their duties, from the commencement of their inquiries by survey to the final accomplishment of them, by a due assessment for the works they feel bound to direct, as well as the raising of the necessary cost of their works by mortgage.

Lastly, commissioners are required to decree costs, consequent upon their decrees under the sewers' laws. Thus, by 3 &

(*y*) *Stracey v. Nelson*, 12 Mees. & Wels. 533.

(*z*) See 8 Vict. c. 18, s. 6, &c.

4 Will. 4, c. 22, s. 55, in all the orders, decrees, &c. of commissioners of sewers, it is competent for them to order that the costs, charges and expenses of putting their decrees in force, shall be paid by the person, body politic, &c., upon, or against whom, or by reason of whose default, or for whose benefit, such orders, &c. shall be made; which costs, &c. may be ascertained under the authority of the Court. And when any such costs, &c. shall be so ordered to be paid, and such orders, &c. shall not be altered, reversed or quashed, either by any Court of Sewers, or any other Court upon removal of the same by *certiorari*, or otherwise, the same costs, &c. shall, at any time after the Court of Sewers immediately following the granting or passing of such orders, &c. (such Court being at the distance of twenty-one days at the least from the service of such orders, &c.), be levied and raised, together with the costs of the distress, by distress and sale of the goods of the defaulter. And the bailiff, expeditor, &c., or any constable, &c., named in the order, &c., may levy the same without any further order or decree of sewers. Provided, that if no distress be found, the costs, &c., and the costs of the distress, shall be raised out of the lands, &c., within the limits of the commission, belonging to such defaulter, as if the same lands had been duly assessed to the amount of such costs, &c. for a rate. And such lands, &c. shall be subject to the same orders, &c. as the same would have been subject to, and such order, &c. shall be of the same force and authority, as if such costs, &c. were a lawful rate assessed and unpaid.

By sect. 56, all such sums so raised for costs, &c., shall be paid into the hands of the treasurer or expeditor of sewers, and shall be laid out in defraying and reimbursing the costs, &c. which have been incurred as aforesaid, subject to the order of the commissioners, or any six of them.

According to the principle established upon other occasions, a local board was held to be entitled to the costs of opposing proceedings, instituted against them on account of works executed by them (a).

(a) *R. v. Marris*, 21 J. P. 580.

Punish-
ments by
commis-
sioners.

We come now, secondly, to consider the various modes of punishment which the commissioners may resort to in cases of disobedience to, or neglect of, their orders. And the stat. of Hen. 8 awards them ample authority on this head. For those who are found negligent in doing the work, reparations, or reformatations prescribed, as well as defaulters in the due execution of the commission, are alike to be punished by distress, fines, and amerciaments, or by other punishments, as may be deemed expedient. And they are further empowered even to decree lands from their owners, upon default of the payment of charges. They may also commit offending persons to prison upon certain occasions, and it will now be our purpose to examine separately each of these penalties, and to set out the particular occasions upon which each of them may be inflicted.

Fines.

And first, with respect to fines. We have seen (*b*) that commissioners may fine their officers for misconduct, and that a fine may be imposed for refusing an office of sewers. And it may even be added, that other persons are equally liable to a fine for misbehaviour, as a sheriff, if he do not duly return the jury, or the writs sent to him, &c., for all these ministerial acts are done in furtherance of the commission, which the commissioners are expressly authorized to enforce (*c*). And Callis says, that if any one oppose the law of sewers refractorily, that is to say, by dissuading persons assessed against payment of their proportions, or by wilfully disobeying decrees, such an one may be fined (*d*). And if this be done in the face of the Court, the offence will be much aggravated, and this is the rebelling, says Callis, which the statute speaks of (*e*).

If a purpresture be committed, by driving piles and stakes into navigable rivers, or by diverting ancient channels from their due courses, the offenders are said to be fineable on presentment, that is to say, if the purpresture be done forcibly, or be presented by the name of purpresture (*f*). Thus, the abbot

(*b*) *Ante*, p. 149.

(*c*) Callis, 175.

(*d*) *Id.* 171.

(*e*) *Ibid.*

(*f*) *Ibid.* 174, citing Keilw. 141.

of Mellefont was fined for erecting a wear in the royal river Boyne, this being a purpresture (*f*). And it had been very anciently determined, that a nuisance done in the king's stream was equally a purpresture with these committed in the highway, for a navigable river is a highway. So, when commissioners set a fine upon one for not obeying their orders, the Court entertained no doubt but that such an act of obstinacy was punishable in this manner (*g*).

But here a distinction very worthy of consideration may be remarked; for the rule adopted is this: that a party cannot be fined, but merely amerced by a jury for *neglects* or *omissions*, although, if he disobey an express decree, or commit some forcible and outrageous act, or if he be especially presented as the author of a nuisance, he certainly incurs the punishment of fine. Thus, it is said, that if one be rated towards repairs, and he neglect payment at the appointed time, he shall not be fined, for this is but a bare omission (*h*).

So, if the offence be not found, but omitted, an amerciamment is only due (*i*); by which expression of the learned serjeant (Callis) we may understand, that if the charge be not expressly presented to be an offence done by force, or a purpresture, the party will be merely punishable as for neglect. And clearly, if an opposition be made in a fair manner, by questioning the legality of a decree, the party resisting it cannot be fined (*k*).

The quantity of these fines, although left to the discretion of commissioners (*l*), must yet, in conformity with the statute of 34 Eliz. c. 3, concerning fines by justices of peace, be reasonable, the nature of the offence being first duly weighed and examined (*m*).

Fine reasonable.

A difference has been taken regarding the traverse of fines, between such as are imposed immediately by the act of the

Fine, whether traversable.

(*f*) Callis, 175.

(*g*) The Protector *v.* Bruster, Sty. 445.

(*h*) Callis, 174. Yet, if there were an express order made upon the individual, a neglect to pay would, it is suggested, be fineable in that case.

(*i*) Callis, 174.

(*l*) Id. 113.

(*k*) Id. 171.

(*m*) Id. 176.

Court, and those made upon a presentment by jury; the former are said not to be, the latter to be, traversable (*n*).

Lastly, it is laid down, that the fines must be assessed, abated or increased, in full Court, and not elsewhere (*o*).

Amercia-
ments.

Something has already been said concerning amerciaments: they are assessed by the jury of sewers for neglect, as of payment of rates, &c., and are considered a more merciful punishment than the penalty of fine (*p*). Thus, if one permit a wall, bank, or other defence belonging to sewers, to fall into decay, contrary to his obligation under which he may be bound to maintain the same in respect of frontage, tenure, custom, prescription, or covenant, he may be amerced for his omission (*q*). So, again, if a person be presented for casting dirt, &c. into rivers, or for pulling down walls unless the offence be presented as having been done forcibly, or expressly as a *purpresture*, by that word, he shall only be amerced (*r*). And thus it is also, if sand beds be suffered to choke up a stream which an individual is bound to cleanse for the passage of boats, or for the draining of the waters, here, again, the party in question is liable to an amerciament, and not to a fine (*s*). But violent irruptions of the sea, or sudden inundations will not, of course, subject a party to any forfeiture of this sort, where the defences have been kept and maintained in reasonable strength, because no policy nor power can resist such visitations (*t*). And in support of this position, Callis cites the case from the Year Book (*u*) above referred to (*x*), where a party was held not to be amerciable, because he had suffered trees to grow into the water, whereby the stream was impeded, for the natural growth of the trees created the nuisance, and not the individual. The sheriff, however, was ordered to abate the nuisance.*

(*n*) Callis, 176.

(*o*) Ibid.

(*p*) Id. 177.

(*q*) Id. 178.

(*r*) Ibid.

(*s*) Ibid.

(*t*) Ibid.

(*u*) 42 Ass. pl. 14.

(*x*) *Ante*, Chap. II.

* Probably the person presented was the owner of the adjoining land. But it did not appear that he lay under any particular obligation to repair; for had that been so, it is difficult to conceive how he could have been relieved or excused from his responsibility, inasmuch as it would have been his duty to have removed the trees.

Lastly, it is said, that these amerciaments may be made, not only by a jury, but also by the presentments of surveyors of sewers (*y*), which, as we have seen, are not traversable. So that if a man be directed to put down a nuisance, and he disobey the order, he may be fined by the Court, or amerced upon the presentment of the surveyor, that the work has not been done.

And an amerciament, unlike an assessment, could always have been made upon a whole township. A distress, therefore, consequent upon an amerciament, made for a neglect to repair was held good, although it was a question whether such a distress could be sold independently of 3 & 4 Will. 4, c. 22 (*z*).

Another and a serious punishment, which, as we have said, may be occasionally inflicted by commissioners of sewers (*a*), is imprisonment. It is hardly necessary to observe, that great caution should be observed in depriving the subject of his liberty; for however correct such a course may be in many instances, circumstances have occurred in which commissioners have widely erred in inflicting a sentence of imprisonment, and have been severely punished for so doing.

Nevertheless, as imprisonment may be sometimes a legal punishment by the laws of sewers, it becomes our concern to explain where it may be safely ordained, where not. And, in the first place, it appears to be clear, that the refractory contemning of an ordinance of sewers, or of the authority of the commissioners, may be punished by imprisonment (*b*), for this conduct is an affront to the commissioners when acting in the execution of their office (*c*). So, again, the commission of some outrageous act, as the obstruction of a stream, the breaking down of a defence, &c., are offences for which the author of them may be deprived of his personal liberty: and here the principle above mentioned in the case of fines applies again, namely, that if a matter be presented as a purpresture,

(*y*) Callis, 179.

(*z*) Ramsey v. Nornabell, 11 Ad. & El. 382; 3 Per. & D. 253.

(*a*) See Callis on this subject, 167—177.

(*b*) Callis, 171.

(*c*) Ibid.

eo nomine, the party presented will fall under the risk of this punishment. And so, again, a wilful refusal (not a bare neglect) to obey the express ordinance of the commissioners, will subject the individual resisting to a similar infliction; for what is this but rebelling against the authority of those who are bound to see that one of the most important commissions of the kingdom be not despised with impunity? (*d*).

It seems, however, to be the proper way for commissioners to summon, or cause the offender to be brought before them; because this power of imprisonment is understood to apply to contempts done in their presence, so that, in case of refusal before them, the party may be committed.

It appears from a review of the above principles and cases, that where the man is fineable, he may be also imprisoned (*e*); and whether the one or other punishment, or whether both be inflicted, is for the commissioners to determine (*f*): and so, again, the length of the confinement is at the discretion of the justices of sewers (*g*). But they will, of course, abstain from exercising their power too harshly; for as it is said that a fine must be reasonable, so it still more strongly behoves commissioners to ordain a merciful imprisonment. And, indeed, to follow a contrary course would be to occasion the removal of their proceedings into the Court of King's Bench, where, to say the least, a severe reprimand would follow upon the due explanation of the complaint.

The power of distress in case of fines is awarded to the commissioners of sewers by the stat. 3 & 4 Will. 4, c. 22. Before that act fines imposed by the commissioners were directed by the statute of Elizabeth to be estreated into the exchequer, and, therefore, it was not competent to levy such fines, and a sentence of imprisonment until the fine were paid was illegal

(*d*) 1 Sid. 145. But this passage applies only to orders respecting repair. If a person be guilty of any outrageous wrong, or act of force against the works of sewers, it should clearly seem, that he may be imprisoned for his fault, whether he submit or not.

(*e*) Callis, 171.

(*f*) Id. 176, 177.

(*g*) Id. 113.

and void (*h*). It appears, therefore, that imprisonment could not be ordained for the non-payment of a fine, because the Court of Sewers possessed no further jurisdiction, as far as fines were concerned, than the mere imposition of them.

Thus, where commissioners of sewers, having assessed a fine upon the vill of D., directed that it should be levied upon W. H. The cattle of this person was accordingly taken to satisfy this fine; and upon this W. H. brought actions, and obtained judgments in the King's Bench, against the persons who had so taken his cattle. But the commissioners sent for him, and having questioned him concerning the matter, urged him to release the actions against those who took his cattle; and, on his refusal, sent him to the gaol of Peterborough, without bail or mainprize, till further order. The Court, upon this, was moved for the discharge of this W. H., and for an attachment against the commissioners. And Lord Chief Justice Coke greatly reprehended the conduct of the commissioners upon that occasion; for the imprisonment, until W. H. should release a judgment, was an illegal act, and the rule for an attachment was made absolute. Upon the return of this rule, the commissioners being unable to make any satisfactory defence, were severely reprimanded, the whole Court agreeing, that they had done a grievous wrong, in the first instance, by amercing a whole town as they had done, and directing that the whole assessment should be levied upon one man (*i*).

Again, a mere neglect to repair, or to pay an assessment, will not be a sufficient cause—it must be an offence of commission not of omission. Thus, where certain commissioners had made orders for the reducing of the size of flood-gates, and also for the imprisonment of all millers who should infringe their first-mentioned orders, it was moved in the King's Bench to quash these decrees; and the Court held, that the order for imprisoning was invalid, for that it could only be understood of a contempt committed in their presence. *Pro tanto*, the order was declared void; but as it was agreed by the Court that an order might be good in part, and bad in part, the remainder of

(*h*) Callis, 176.

(*i*) *Hetley v. Sir John Boyer and Others*, 2 Bulst. 197; Cro. Jac. 336.

the decree was allowed to stand (*k*). Indeed, as the learned writer on sewers remarks, one punishment may be inflicted for contempt of the Court (if such be the case), and the other for the wrong committed (*l*), and *vice versâ*, or both punishments, as was before said, may be awarded, in reason, for the same offence.

But, nevertheless, supposing that some orders of commissioners were pending in the Court for the purpose of being confirmed or quashed, and they be compelled, in the mean time, to make a new order, here, if the refusal to obey this last mandate be a fit matter for imprisonment, the justices of sewers have full authority to commit, for the *commission* itself is not removed into the Court of King's Bench (*m*).

And now by 3 & 4 Will. 4, c. 22, s. 53, no fine, amerciamment, &c., for not cleansing, &c., any walls, banks, &c., or for any other cause shall be returned into the Court of Exchequer, but the same shall and may be demanded and received by the officer of the commissioners appointed to receive the same. And if not paid upon demand, it may be levied by distress, by warrant under the hands and seals of any six commissioners, together with the costs of such distress, rendering the overplus (if any), to the party entitled thereto. And the commissioners are authorized to issue this warrant, and the said fines, &c., when received, shall be applied by the commissioners to the same purpose, as the monies received for the general expenses of sewers.

The form of the warrant is given by the 54th section, and subjoined in the note.*

(*k*) *Inhabitants de Oldbery v. Stafford*, 1 Sid. 145.

(*l*) *Callis*, 176.

(*m*) See *The Protector v. Bruster*, Sty. 445.

* "To _____ our bailiff of sewers, and to _____ and _____ our collectors, and to each and every of them, and to all constables and other peace officers.

"Whereas at the Court [*or session*] of sewers holden for the limits [*here state the name of the commission*] on the _____ day of _____ last, A. B. of _____ in the county of _____ carpenter, was fined [*amerced, or otherwise, as the case may be*] in the sum of _____ which sum it hath this day been proved to us, the undersigned, being six or more of the justices and commissioners of sewers for the aforesaid limits, by the oath of _____ duly appointed to receive the same fine, [*amerciamment, penalty, or forfeiture, as*

Again, commissioners are expressly empowered by the Legislature to obtain payment of assessments by distress. Indeed, the word "distress" stands at the head of prescribed punishments in the statute of Hen. 8.

Lastly, the stat. 7 Ann. c. 10, which was passed for the purpose of including copyhold lands within the powers of commissioners, so that they might decree such lands from their owners in cases of default (*n*), gives a general power of distress, which, of course, embraces copyhold property.

By stat. 3, it is enacted and declared, that the commissioners, or any six of them, may, by warrant under their hands and seals, give authority to any person to levy assessments upon the lands, meadows, marishes,* or grounds liable or chargeable, by distress and sale, the overplus of the money arising from such sale to be returned to the owner of the goods distrained, after deducting reasonable charges.

Callis divides the distresses made by virtue of a commission of sewers into three sorts: 1st, such as are judicial; 2ndly, ministerial; and 3rdly, of common right; which latter are levied by a lord whose tenant holds land by the tenure of repairing a bank, wall, or other work of sewers (*o*).

The judicial distress is for the purpose of removing a nuisance, or upon the presentment of a decayed wall or bank, in which case a warrant goes to the sheriff to distrain A. B. to the repair, or is awarded in like manner for the destruction of the nuisance (*p*). Nevertheless, there is a loose note in Keble, where

the case may be], that the said hath neglected or omitted to pay when demanded of him: These are therefore to authorize and command you, any or either of you, to levy the said sum of by distress and sale of the goods and chattels of the said together with the costs and charges of such distress and sale, rendering the overplus, if any, to the said . Given under our hands and seals the day of in the year of our Lord one thousand eight hundred and ."

(*n*) See *post* on this subject.

* Marshes.

(*o*) Callis, 180, 181.

(*p*) *Id.* 180.

W.

P

it is said, that the Court denied a distringas prayed for in order to compel the repair of certain sea walls in Essex, there being no such judicial writ, but only in the statute Westm. 2,* and only in the chancery (*q*); and it will be observed, that no presentment appears to have been made in this case. The usual course now is, to avoid these difficulties by directing the repair wanted, and assessing the offender upon a presentment by jury, and then the distress becomes merely ministerial, being executed by the officer in the ordinary way.

And this mode of distress for assessments or for arrearages has always been acquiesced in (*r*). For the purpose of abating a nuisance, a presentment is made by the jury, and the Court may then direct a writ of distress to the sheriff, in order to put down the thing complained of.

Warrant.

It was, doubtless, customary, before the Statute of Anne, for the officer to procure a warrant from the commissioners to distrain, and that act expressly declares, that the warrant for that purpose shall be under the hands and seals of the commissioners; nevertheless Mr. Sergeant Callis was of opinion, that the collector might take goods without any such express warrant, because he says, that the statute and commission, which are the general laws, give of themselves the power of distress (*s*). And, therefore, taking the statute to be declaratory, a distress, without a warrant, might not, however unadvisedly made, be altogether adjudged void. However this be, some notice of the tax demanded must be given to the party, before a distress can be made, and a demand of the sum due must take place. For want of showing such a notice, a plea in trover justifying the taking of cattle under commissioners of sewers, was holden bad (*t*).

And, further, the warrant should mention the name of the party refusing to pay, so that where for want of such proof it

* Cap. 36.

(*q*) Anon., 2 Keb. 255.

(*r*) See 5 Rep. 100.

(*s*) Callis, 180; 7 Com. Dig. 347.

(*t*) Whitley v. Fawsett, Sty. 13.

was urged, that the warrant was upon the face of it illegal, the Judge held the objection valid* (*u*).

There was an act for draining and preserving the fens near the river Witham. A warrant was issued under it to *two* persons, a collector and a bailiff, but the distress was made by one only of those persons. An action having been brought, the verdict was for the defendants. But a new trial was moved for, on the ground that a joint warrant to *two* could not be executed by one. The Court, however, discharged the rule on the authority of *Lashbrooke's case* (*x*), and also because the objection was one of form, for the right to make the distress was not disputed (*y*).

In adverting for a moment to the place where a distress may Where. be made by commissioners of sewers, we may bear in mind the decisions on this subject above mentioned, and observe, that in case of a distress by the lord upon a person bound to repair by reason of tenure, it must be made upon the land so held by tenure, and not elsewhere (*z*). So, secondly, if there be a judicial process of distress for the purpose of compelling repair, or abolishing nuisances, this must take place within the limits of the commission (*a*). And, thirdly, a distress for a rate or tax imposed by commissioners, may be taken anywhere within the realm (*b*).

In support of the first point, we have a case, where an abbot and his predecessors were charged with the repair of a gutter by reason of their tenure. The presentment, however, failed to show where the lands lay which were charged, and for that cause it was deemed to be void (*c*). Here *Callis* observes, that

* This was a case of replevin, in which the defendants had avowed under a warrant from the commissioners of sewers. It was urged, that the defendants ought to produce the inquisition which must have been taken by the commissioners before their warrant could be made out, but the learned Judge would not allow of this objection.

(*u*) *Farr v. Crisp and Others*, 2 Barnard, K. B. 321.

(*x*) *Hutt*, 157.

(*y*) *Lee v. Vessey*, 25 L. J., Ex. 271.

(*z*) *Callis*, 182, 184.

(*a*) *Id.* 183, 185; 7 Com. Dig. 348.

(*b*) *Id.* 185; 7 Com. Dig. 348.

(*c*) *Callis*, 182.

if the charge be upon land, by virtue of a prescription or custom, the obligation upon the tenant cannot be enforced in any other manner than by presentment (*d*).

Whose goods. With respect to the property in the goods taken, the following distinction has been adopted, namely, that if the charge be on the lands, as in case of arrearages, taxes, &c., the goods of a stranger may be the subject of the distress, as well as those of the party charged; but if the person only be charged, as in the case of an amerciamment, the goods of the party amerced, and none other, can be touched (*e*). However, according to an opinion expressed by Brampton, C. J., in Thorne and Tyler's case (*f*), namely, that the goods of an under-tenant may be distrained for an amerciamment imposed upon the customary tenant, it should seem, that in the case of an amerciamment by virtue of a law of sewers, the cattle or goods of an under-tenant might also be taken, that is to say, where the penalty is imposed upon the *landlord* (*g*).

Sale of the
distress.

Some doubt seems to have prevailed at one time, whether commissioners were empowered to sell the goods so distrained by them as we have above mentioned (*h*); but there is now no difficulty upon that point, since both the statute of Anne, as well as prior decisions, have expressly recognized the propriety of such a sale. Mr. Sergeant Callis, after entering into cases analogous to the present, concludes that, as the commissioners are empowered to follow the customs of Romney Marsh, and as those customs warrant the sale of distrained goods, the commissioners may therefore adopt that precedent (*i*).

And, further, no question exists, but that the assignee of land may lose his goods by distress and sale on account of this tax of sewers, because the assessment is a charge upon the land, to whomsoever it may belong. And the assignee is no stranger to

(*d*) Callis, 183.

(*e*) 1d. 185, 186; 7 Com. Dig. 348. This was doubted by Roll, J., in Sty. 13.

(*f*) Mar. 161.

(*g*) Callis, 188, note to the Ed. of 1685.

(*h*) See Callis, 188, 192.

(*i*) Callis, 192.

the land, inasmuch as he takes it *cum onere* (*k*). But the third point, regarding the sale of a stranger's goods, seems to present some difference of opinion. Callis is express on this point, namely, that no goods can be sold by the power of these laws of sewers, except those of the party assessed; because, says the learned author, it is not agreeable to any rule of law that the goods and chattels of a stranger should be absolutely taken away from him, and sold for the debt and default of another man (*l*). So again, Lord Chief Baron Comyns recognizes the authority of Callis in this particular, observing, that the goods of a stranger cannot be sold for an assessment upon A., though levant and couchant upon his land (*m*). The above position in Callis, however, may be understood with a qualification; for instance, if one who has been taxed in respect of this impost, assign or let his land to another, there the assignee or lessee shall certainly be charged, because, as we have already said, the land is taken upon such occasions *cum onere* (*n*).

Again, in the case of *Whitley v. Fawsett*, which has been referred to in a former page, although no doubt seems to have existed as to the sale of distresses which belonged to the owner of the lands, yet the Court hesitated concerning the beasts of a stranger, and, finally, it was determined, that property of the latter description could not be disposed of in this way (*o*).

Nevertheless, a case subsequently occurred, in which the matter appears to have been decided differently. It was an action of trover, and the evidence upon a plea of not guilty was, that the goods were taken and sold by virtue of a commission of sewers. Roll, J., said, that the commissioners might sell the distress, and that he, in common with Bacon, J., had doubted of that in *Whitley and Fawsett's* case, and the issue was accordingly found for the defendant. Now, as the doubt in the case from *Style* was only concerning the beasts of a stranger, it results, that the Court on the last case had given their sanction to a sale of such property, and it is therefore impossible to con-

(*k*) Callis, 193, note (*a*), Ed. 1685.

(*l*) Id. 192, citing Dy. 199.

(*m*) 7 Com. Dig. 348.

(*n*) Callis, 193, note (*a*) to Ed. 1685.

(*o*) Sty. 12.

sider the law upon this point of distress as consistent, unless indeed we call in the distinction above adverted to regarding the assignee or lessee to our aid, of which however there is no proof in the report of *Combs v. Cheny* (*p*).

Warrant.

Lastly, it is observable, that the statute of Anne speaks of a warrant for the distress and sale, and however possible it might be, that a distress without warrant might not be considered void, it appears certain, that a sale without such a sanction would be entirely invalid. The bailiff, therefore, not being competent, *ex officio*, to effect such a sale, must have recourse to the commissioners, who, if they see fit, will issue a special warrant for that purpose (*q*).

Replevin.

A few words on the subject of replevying these distresses will close that part of our subject; and since the doubts expressed by Lord Kenyon, concerning the authority of Callis, touching the replevin for sewer rates, it may not be too much to suggest, that if the question be raised, the decision may possibly be, that a replevin lies in all cases of distress made under the authority of commissioners of sewers (*r*).

Mr. Sergeant Callis thought, that neither the sheriff, nor his deputy, could award warrants of replevin *ex officio* upon these occasions, because the distress was under the protection of a superior Court of a higher degree than a sheriff's ministerial warrant(*s*). But he agrees, that a replevin lies out of the king's Courts at Westminster to deliver a distress so taken, because those Courts are of a higher nature than Courts of Sewers(*t*); and, in either case, if the distress be taken, and sold, the learned writer allows of a replevin, for, by the sale, the goods no longer remain under the protection of the law of sewers(*u*). And so, again, supposing that such a tax were

(*p*) *Combs v. Cheny*, Al. 92. By custom, however, such a sale may take place.

(*q*) Callis, 192. If there be a summons, the warrant will be good, although it do not recite the presentment. *Warren v. Dix*, 3 C. & P. 71. With respect to the proceeding by distress under the Health of Towns' Bill, 11 & 12 Vict. c. 63, see that statute, sects. 103, 131, &c.

(*r*) But see Willes, 672, note (*b*), by Mr. Durnford.

(*s*) Callis, 199.

(*t*) Ibid.

(*u*) Ibid.

imposed upon A., and the goods of B. were taken in the house of A. for this tax, "B." says Callis, "may sue out a replevin from the sheriff, inasmuch as his goods are expressly bound by the laws of sewers" (x). And so, again, for the like reason, a distress made by a lord upon his tenant for non-repair, to which he may be bound *ratione tenuræ*, is replevisable (y). So, if one grant a rent out of his land, with a cause of distress, together with a grant or covenant that the grantee may distrain and detain the distress till he shall be satisfied his rent, yet a replevin lies also in that case (z). But if there be a judgment in the king's Court, or upon a decree made in the Court of Sewers, and a writ, or a warrant of *distringas ad reparandum* be awarded, and the goods of the defaulter be taken, here the goods, says the learned sergeant, cannot be delivered by replevin, either out of this Court, or any other Court of the king, because it is an execution out of a judgment (a).

It was more particularly concerning this latter proposition, that Lord Kenyon expressed his doubts in a case, where the authority of Callis was strongly pressed upon the Court in opposition to a replevin. A rule had been obtained, calling upon the plaintiff to show cause why the plaint, removed by *accedas ad curiam* from the hundred Court of Thornbury, in Gloucestershire, should not be quashed. It appeared that a warrant had been issued by the commissioners at a Court of sessions of sewers, held for the lower level of Gloucestershire, to demand a certain sum from A., or her tenant (the plaintiff), for expenses incurred in the repairs of a sea-wall, neglect having been made to do the same in pursuance of a presentment. The warrant further directed, that in case of refusal or omission to pay, these expenses were to be levied by distress and sale. Both A. and the plaintiff refused to pay, and the defendant in consequence distrained a mare belonging to the plaintiff. The mare was then replevied by the steward of the hundred Court of Thornbury, and the plaint was afterwards removed into the Court of King's Bench. The Court of King's Bench were

(x) Callis, 199. And, in illustration of this position, he cites *Rooke's case*, 5 Rep. 100.

(y) Callis, 200.

(z) Ibid.

(a) Ibid.

strongly inclined to discharge this rule; but the opinion of Callis being urged, the Court took time to advise; and, on a subsequent day, the counsel against the rule having observed that no judgment appeared to have been given according to the affidavits, but merely a presentment without any trial, the Court said, that this at all events was a reason why they ought not to interfere in a summary way by quashing the proceedings. The defendant might put his objection upon the record in a formal manner; and it is further said, that Lord Kenyon, during the argument, expressed very strongly doubts respecting the opinions cited from Callis (*b*).

Nevertheless, there are authorities to the effect, that where a distress and sale of goods are ordered by virtue of an *act of Parliament*, it is a proceeding, as Callis observes, in the nature of an execution, and that a replevin will not lie. And it appears, that attachments have been known to issue against the sheriff upon one occasion, and against the party on the other, for replevying under such circumstances (*c*). However, it should be added, that in a case under the Highway Act, 13 Geo. 3, where this argument was again urged, namely, that a replevin cannot be enforced where the distress arises under the directions of a statute, the Court of Common Pleas refused to interfere, and discharged with costs a rule to show cause why certain proceedings in replevin should not be set aside (*d*).

AVOWRY.

By 23 Hen. 8, c. 5, s. 11, if any action of trespass, or any other suit, be attempted against any one for taking any distress, or for any other act done by order of the commission, or the laws and ordinances thereof, the defendant may avow, make cognizance or justify, alleging that the distress has been taken under the commission for the tax due, or for any other cause under the same authority, and without expressing any other matter, or any commission, laws or ordinances. The plaintiff may then reply *de injuriâ*, and the issue shall then be tried in the accustomed way by jury, and the whole matter shall be

(*b*) *Pritchard v. Stephens*, 6 T. R. 522.

(*c*) See Willes, 673, in the note, where the cases have been collected by Mr. Durnford.

(*d*) *Fenton v. Boyle and Others*, 2 New Rep. 399.

given in evidence. And by sect. 13, if, after issue tried, a verdict pass for the defendant, or the plaintiff be nonsuited, the defendant shall recover treble damages, with costs also in that behalf, to be assessed by the same jury, or Court, to inquire of damages, as the cause shall require. In order that the defendant may be entitled to damages under this section, it is necessary that he should claim them on the record; and Lord Ellenborough refused to give the defendant damages upon one occasion where the defendant had neglected to make such a claim, the learned chief justice observing, that he did not wish to introduce such an anomaly (*e*).

It being possible, that notwithstanding the penalty of a fine, the punishment of imprisonment, and the ulterior proceeding of distress, the commissioners might yet fail in their chief object, that, namely, of obtaining payment of the tax assessed, or other sum required by them, the stat. of Hen. 8 invests them with a power of an order superior to the above, and empowers them to decree lands from their owners in default of such payment. The 8th section of the act prescribes this as follows: If any person be assessed, or taxed to any lot, or charge for any lands, tenements or hereditaments, within the limits of any commission of sewers, and he do not pay the said lot and charge, so that there be in fact a lack of payment thereof, the commissioners, in such case, may ordain and decree the same lands, &c. from the owner and his heirs, to any person for years, or for life, in fee simple or fee tail, for payment of the charge in question (*g*). Every such decree, however, must be written on parchment indented, and must be under the seals of six commissioners (*h*), and being so made, it shall bind every person who may have, at the time of the decree, any interest in said lands, &c. in use, possession, reversion or remainder, their heirs and feoffees; and further, such decree shall not be reformed unless by authority of Parliament hereafter to be summoned and holden within the

Decree of
lands from
their
owners (*f*).

(*e*) 3 C. & P. 71, n.

(*f*) It is worthy of remark, that the Metropolis Sewers Act, 11 & 12 Vict. c. 112, s. 145, now superseded, which applied the statute of Hen. 8, concerning sewers, to that act with certain exceptions, made the decree and ordinance of lands from their owners one of these exceptions.

(*g*) 23 Hen. 8, c. 5, s. 8.

(*h*) 13 Eliz. c. 9, s. 1.

realm. And the 9th section of the stat. of Hen. 8 provides, that not only the lands of private persons, but those of the king also, shall be bound by these laws and ordinances, and not lands, tenements or hereditaments only, but all other casual profits, advantages or commodities whatsoever (*i*).

Upon a review of these sections (which, notwithstanding that they are introduced by a proviso, are, as Callis observes, the first legislative enactments respecting the decreeing of lands from their owners by commissioners of the rate), it is worthy of particular remark, that they apply to assessments only. If lands be charged with this assessment, the general principle is, that they may be sold for non-payment of the rate (*k*). So if an assessment be laid generally on a vill, and by a decree of the commissioners the tax be afterwards distributed in particular sums upon individuals, here the lands of those in the vill, who make default, may be decreed from them (*l*). The stress laid by the statute is upon disobedience to the decrees of the commissioners ordaining a tax. Thus, supposing that the lands of A. be generally charged, as by prescription, covenant, or otherwise, to repair a sea-wall, and he neglect to repair, although, as we shall see presently, his lands cannot be taken away for the mere neglect, yet if the commissioners make a rate upon him for the expenses of this repair, and he do not pay it, here he may lose his lands by virtue of a decree of sewers; for, notwithstanding that the charge accrued by the rules of the common law, yet the assessment was imposed by the authority of the statute (*m*). So, again, if land be holden by the tenure of paying so much for repairing a bank, here, if the commissioners order the party to pay the money according to the terms of the tenure, the commissioners may decree the defaulter's land from him upon his neglect, for here the ordinances of the justices of sewers would be disobeyed (*n*).

But, independently of a decree, the commissioners cannot exercise the power, as for mere neglect, &c.; nor can they

(*i*) 23 Hen. 8, c. 5, s. 9.

(*k*) 7 Com. Dig. 348.

(*l*) Callis, 205; 7 Com. Dig. 348.

(*m*) Callis, 204; 7 Com. Dig. 348.

(*n*) Callis, 204.

decree away lands in any cases except those of defaults in paying assessments. Therefore, an omission to fulfil an obligation to repair, imposed as a condition of tenure, will not of itself work this forfeiture (*o*). So it is also of one bound by prescription, covenant, &c., there being no decree, and, consequently, no act of disobedience to the commissioners.

Again, if the name of the owner of the lands be not inserted in the assessment there is no power to decree them away; and so in the case of a vill, if a charge be laid generally, without any decree upon particular persons, the land of the township cannot be taken away (*p*); that is to say, admitting that a township can be assessed at all without a special custom, which, as we have seen before (*q*), is questionable.

Then, again, this punishment must be confined to defaulters in the payment of assessments for non-repairs, &c.; and, consequently, if a fine be set, or an amerciamment assessed, the party refusing, or unwilling to pay, cannot lose his lands as above mentioned; because these are "mulcts and punishments," not assessments towards the works of sewers (*r*). And thus, moreover, if there be a decree to abate a nuisance, and the party against whom the order is made resist the authority of the commissioners, he cannot be deprived of his land for this fault; although if an expense were incurred by the commissioners in abolishing the mischief complained of, and they should then levy an assessment to reimburse themselves, a party refusing to pay might certainly, in that case, come within the provisions of the 8th section.

A question naturally arises here, whether commissioners are enabled absolutely to deprive a person of his land upon his default; and it may be remarked, that the power with which they have been invested by the statute of Henry 8 is somewhat qualified. And the principle is, that they ought not to take more than will satisfy the demand which they have upon the

(*o*) Callis, 204; 7 Com. Dig. 348.

(*p*) Callis, 205; 7 Com. Dig. 349.

(*q*) *Ante*, p. 96, and so 4 & 5 Vict. c. 45, s. 1, &c., *ante*, p. 96.

(*r*) Callis, 205; 7 Com. Dig. 349.

land. Whence it follows, that if the granting of a term for years would satisfy the tax, they ought not to convey away a defaulter's estate in fee simple (*s*); for the law intends, that moderation should be used in this particular (*t*).

Three hundred acres of land in the fens were demised to A., who covenanted to pay all taxes. A tax of 30*l.* was imposed on this land, and a penalty of 3*l.* incurred, and the officers sold one hundred acres to one of the commissioners for 33*l.* The lessor, upon this, brought a bill for relief, alleging a combination between the lessee, who had rent sufficient in his hand to satisfy the sum of 33*l.*, and the purchaser; and, further, that the property was worth 400*l.* The defendant, denying the combination, pleaded the statute of draining, and that the sale was made according to the provisions of such statute. The Lord Chancellor allowed the plea, observing, that he could not relieve against an act of Parliament; for that, if he were to do so, the whole economy of the preservation of the fens would be destroyed (*u*). But the custom of the fens appears to be, that the sale of land there is made four months after default of payment, twice in the year, pursuant to the act of draining; that, in the first place, a certain number of acres are exposed for sale to make up the sum required, that the quantity of land is increased until a purchaser be found, and that they never sell for more than the arrears of the tax and penalty,* it not being competent for them to do so (*x*).

What lands
to be sold.

With regard to the property which may be thus decreed for sale, it seems that all lands within the limits of the commission may be so treated; but that none, except such as are charged with the assessment, can be thus disposed of (*y*). Formerly, in the time of Callis (*z*), copyhold lands could not be sold for

(*s*) Callis, 212.

(*t*) Ibid.

(*u*) *Brown v. Hamond*, 2 Ch. Ca. 249.

* With regard to the penalty, the power to sell for that must be under the particular act; as we have seen, that, according to the general rules of sewers, a sale of land cannot be made for the non-payment of fines and penalties.

(*x*) 2 Ch. Ca. 250, note.

(*y*) See Callis, 206.

(*z*) Ibid.

these purposes, because the customs of manors would have been thereby contravened; nor could the freehold of the copyhold be so evicted, because the lord's right was but the shadow, but the copyholder's the substance (*a*). Nevertheless, by 7 Ann. c. 10, ss. 1 and 2, the following provisions were made for the sale of copyhold lands upon these occasions. Commissioners of sewers were thereby enabled to decree such lands from the owners, and their heirs, to any person, to the extent of the estate possessed at the time of the decree by such owner, such decrees to be executed in the same manner as decrees concerning freehold. But it is provided, for the benefit of the lord of the manor, that the purchaser, before he shall enter, and take any profit, must agree with the lord of the manor for the usual fine, and then the lord shall grant the copyhold to the vendee at the next Court and shall admit him as tenant (*b*).

Something remains to be said with respect to the liability of individuals to these decrees, as far as their particular estates are concerned. And, first, the statute is considered to bind heirs in tail, so that they will be bound by a sale of the land of the ancestor in tail (*c*). There are express words to bind the heirs "in tail," and with regard to the heirs of tenants in fee simple, these last would have been concluded without the word "heirs" (*d*). Moreover, it is said, that women under coverture, infants, insane persons, and such, are under the force of these decrees, because the decrees are made for the benefit of the commonwealth (*e*). Who bound
by these
decrees.

It is laid down, that although, in the making of an assessment, commissioners are not bound to take notice of the particular nature of the estate, yet that they must take this matter into consideration, when they come to decree away the lands from their owners (*f*); and this observation materially applies to the cases of tenants in common, and joint-tenants. So that if a joint-tenant, or tenant in common, refuse or neglect to pay his proportionable share, a moiety only of the lands of these persons

(*a*) Callis, 206.

(*b*) 7 Ann. c. 10, ss. 1 and 2.

(*c*) 7 Com. Dig. 349.

(*d*) Callis, 208.

(*e*) 1d. 210; 7 Com. Dig. 349.

(*f*) Callis, 210.

respectively shall be sold (*g*). Callis writes thus concerning tenants in common: "Yet, in this case of joint assess imposed upon tenants in common, and one would pay his moiety, and his companion refuseth, the commissioners of sewers cannot sell a moiety of the land, for that it is a joint sess, and was not imposed by moieties, and the sale doth depend upon the sess, and all may not be sold, for that one tenant in common cannot prejudice his companion in things of realty" (*h*).

However, religious corporations are not affected to the same extent as individuals by the statute. And, therefore, it is laid down, that the successors of bishops, deans, prebends, parsons, vicars, &c., seised of lands in their public capacity, cannot be deprived of their lands by virtue of such decrees of sewers (*i*). And for this reason: the statute of sewers extends to bind lands in perpetuity, and the statutes of Elizabeth restrain alienation; and, therefore, the general statutes of sewers shall not have the effect of dispensing with the restraining statutes (*k*). And Mr. Sergeant Callis adds, that although the statute mentions heirs, it is silent as to successors; nevertheless, he is of opinion that these ecclesiastical persons are bound for neglect during their enjoyment of the lands; and, consequently, that lands may be decreed from them so as not to prejudice those who come after them (*l*).

To whom
lands may be
decreed.

Lastly, it is said, that lands may not be decreed to a corporation, as a mayor and commonalty, dean and chapter, &c., by reason of the statute of mortmain, inasmuch as the Mortmain Act is not repealed by the statute of sewers in this respect (*m*).

Mandamus.

The conservators of the Bedford Level moved for a mandamus against persons alleged to be liable *ratione tenuræ* to repair the banks of the Ouse. But as it appeared that the prosecutors were commissioners of sewers, the rule was discharged, there being another remedy (*n*).

(*g*) 7 Com. Dig. 349.

(*h*) Callis, 211.

(*i*) Id. 209; 7 Com. Dig. 349.

(*k*) Callis, 209.

(*l*) Ibid.

(*m*) Id. 212.

(*n*) That is to say, under 15 Car. 2, c. 17, s. 15; *R. v. Gamble*, 11 Ad. & El. 69; 3 Per. & D. 122.

Commissioners of sewers may also proceed by indictment in their Court against persons, for instance, who commit nuisances within their jurisdiction. But it must be remembered, that they cannot exceed the limits of their commission; so that, where an indictment was removed into the King's Bench by *certiorari*, although the particular exceptions made against it were overruled, yet Roll, C. J., said, that it was bad, because it set forth a damage to the highway, with which the commissioners had no concern, for their power extended to passages of water only (o). Indictment.

And now that we are upon the subject of indictments, it may not be improper to observe, that a facility is afforded by the law for the conviction of such as commit depredations upon commissioners of sewers. Thus by 7 Geo. 4, c. 64, s. 18, it was enacted, that in any indictment or information for any felony or misdemeanor committed on, or with respect to any sewer, or other matter within or under the view, cognizance or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers, within or under whose view, cognizance or management any such things shall be, and it shall not be necessary to specify the names of any of such commissioners. And similar provisions with reference to persons who damage or steal from, or otherwise injure these buildings or works, are made by 3 & 4 Will. 4, c. 22, s. 47. General words embodying all these offences, and ordaining that all property of commissioners of sewers may be laid without naming them, may be found in 11 & 12 Vict. c. 43, s. 4.

The commissioners may sue in the name of their clerk either at law or in equity, in any matter concerning their lands, or any river, &c., or work, under their management. The action may be brought in the name of one commissioner, or in the name of the clerk. And in an action of ejectment for recovering their property, or houses, &c., the demise may be laid in the names of six commissioners, or in the name of their clerk, and no action shall abate or be discontinued by reason of the Actions.

(o) *Rex v. Hide*, Sty. 60.

death, resignation or removal of such commissioners or of their clerk, or by the expiration of any commission of sewers (*p*). A notice by the clerk is a notice by the commissioners, and every such notice is evidence, without more (*q*). And by 24 & 25 Vict. c. 133, s. 43, all notices, after service, shall be binding on "all persons claiming by, from, or under the owner, as if served on such persons." By sect. 44, personal service (unless a special mode is provided) is required, or the notice should be left at the last place of abode, or in case of absence from the United Kingdom, or if such place cannot be found, then with the occupier, or fixed upon some conspicuous place, part of the lands, if there be no occupier. So, by sect. 45, in the case of a corporation, joint stock company, &c., at the office, or upon the agent, or, in default, upon some conspicuous place. So, by sect. 46, as to the occupier: 1, personal service; 2, the last place of abode; 3, the fixing at some conspicuous place, if absent from the United Kingdom, or if the last place of abode cannot be found.

By 3 & 4 Will. 4, c. 22, s. 58, every clerk and commissioner whose name shall be used in any bill, information, prosecution or indictment under the act, and every commissioner in whose name the commissioners shall sue, shall be fully reimbursed his costs, &c., as plaintiff or defendant, or in respect of his name being used, out of the monies in the hands of the clerk, treasurer or expeditor, or out of the sewers' rates, which rates may be levied under the act for the purposes aforesaid.

And by 24 & 25 Vict. c. 133, s. 52, all costs, &c. in legal proceedings shall be defrayed out of the rates, and no commissioner shall be personally liable.

By 3 & 4 Will. 4, c. 22, s. 59, the circumstance of the clerk being plaintiff, prosecutor, or defendant in any action, suit, &c., shall not affect the competency of such clerk to be a witness in any such action, &c., in the same manner as if his name had not been made use of as the plaintiff, &c.

(*p*) 3 & 4 Will. 4, c. 22, s. 57.

(*q*) 24 & 25 Vict. c. 133, s. 42.

And by 4 & 5 Will. 4, c. 45, s. 9, no person rated or liable to be rated to any tax, rate or scot, under or by virtue of any commission of sewers, shall be deemed an incompetent witness before any Court of Sewers (*r*).

It was determined, upon one occasion, that commissioners of sewers had not such a possession in their works, as to enable them to maintain trespass against wrongdoers. The plaintiffs were commissioners of sewers for the Pevensey or Pett Level, and the defendants were the commissioners of Rye Harbour. The action was trespass, for breaking into and weakening a wall, a bank, and a dam, belonging to the plaintiffs, situate at Rye, and taking away certain materials therefrom, so that the wall, &c. became exposed to the descent of the water, and whereby also the said wall, &c., were utterly demolished and destroyed. There was a second count, for taking away the bricks of the plaintiffs. After a considerable body of evidence on both sides, as to whether a certain dam and sluice had been necessary for the purposes of drainage, a verdict passed for the plaintiff, subject to the question, whether the commissioners could be said to have had such a possession as would enable them to maintain the action. And after a solemn argument, the Court gave judgment of nonsuit; for the justices are not invested with these powers as individuals, but in their public capacity; and they are incompetent to do any act *as* commissioners, which goes either to show exclusive possession, or any possession whatever (*s*).

No action of
trespass
against
wrong-
doers.

But the stat. 3 & 4 Will. 4, c. 22, s. 47 (*t*), has effected an alteration in this respect, as we have just seen. And although all lands within the view and cognizance of commissioners of sewers are not vested in them, yet the statute above mentioned vests all buildings and works belonging to their jurisdiction in them, so as to enable them to recover in trespass

(*r*) See also the stat. 6 & 7 Vict. c. 85, s. 1, partially repealed by 14 & 15 Vict. c. 99, *quod vide*.

(*s*) *The Duke of Newcastle and Others v. Clark and Others*, 8 Taunt. 602; 2 Moore, 666.

(*t*) See *ante*, p. 199.

against any person who may do damage to such buildings or works.

Certain commissioners under a drainage act, 6 Geo. 4, c. 145, were empowered to make an assessment, and to appoint assessors. The apportionment of the rate was to be made in writing, and signed by the assessors. Three were appointed, and all three met; but two only at length signed the apportionment, and it was attempted, through the means of a mandamus, to compel the other to sign. But the Court discharged the rule, for a majority had signed, and such concurrence and signatures were sufficient. And *Grindley v. Barker* (x) was referred to as an authority upon this point by Lord Tenterden (y).

Proceedings
under 11 &
12 Vict. c. 63.

Sundry proceedings in the nature of punishments are entrusted to the Boards of Health under 11 & 12 Vict. c. 63.

We have seen that the remedy by distress may be occasionally resorted to under that act.

By 11 & 12 Vict. c. 63, s. 129, damages, costs and expenses, directed to be ascertained or recovered in a summary manner, shall be so recovered before two justices with costs, and in default a distress warrant may be issued. So, again, a penalty imposed under any bye-laws, may likewise be recovered before two justices with costs, and levied by distress. And until a return be made to the distress warrant, the justices may detain the party, unless he give security for his appearance on the day of the return, which day shall not be more than eight days from the time of taking the security. Then upon a return made that no sufficient distress can be had, the offender may be imprisoned for a term not exceeding three months, without bail, unless such penalty and costs be sooner paid. The 130th section points to Schedule (E.) of the act as the form of conviction. The 131st section ordains, that one justice may grant any summons under the act, unless it be otherwise provided; and the justice granting the summons, or two justices, as the

(x) 1 Bos. & Pul. 229.

(y) *R. v. Whittaker and Others*, 9 B. & C. 648.

case may be, shall hear the case upon oath. The costs, however, are to be in the discretion of the justice or justices. In case of distress, the surplus is to be rendered to the party distrained upon, on demand, and no distress shall be unlawful for want of form, &c., but damages may be recovered in an action upon the case. The 132nd section enacts, that justices, being also members of any local board, may, in petty sessions, exercise the jurisdiction vested in them as such justices under this act. Then, with respect to informers, the 133rd section ordains, that the leave of her Majesty's Attorney-General in writing must first be had, before proceedings are commenced; unless in the cases of proceedings by a party grieved, or by the local board. The time for proceeding is limited to six months, and half the penalty, unless otherwise provided for, shall go to the informer, and half to the local board; unless the local board be the informers, in which case they shall have the whole. All sums recovered by the board shall be paid to the treasurer, and be carried to the district fund account. However, by sect. 134, it is declared and enacted, that no person shall be relieved from any other liability by reason of his being liable to any penalty under the act.

The appeal clause (z) applies to any rate or to any order, conviction, judgment, &c. of justices under the act. By sect. 137, no rate, nor any order, conviction, &c., shall be quashed for want of form, nor be removable by *certiorari* or other process.

Lastly, by sect. 138, the local board of any noncorporate district may sue and be sued in the name of their clerk, and in ejectment the demise may be laid in his name; and in cases of stealing, or of wilful damage, the property may be laid in him, and all legal proceedings shall be carried on in his name. No proceedings shall abate or be discontinued by reason of his death, resignation or removal, or by reason of any change or vacancy in the local board. And all the expenses of the clerk shall be repaid him out of the general district rates (a).

(z) 11 & 12 Vict. c. 63, s. 135.

(a) See *Clements v. Pollard*, 10 Ex. 817.

Perjury.

By sect. 147 of this same statute, every person who, upon any examination on oath under the provisions of the act, shall wilfully and corruptly give false evidence, shall be guilty of perjury.

All penalties under the 24 & 25 Vict. c. 133, are, by sect. 51, to be recovered under the provisions of 11 & 12 Vict. c. 43.

CHAPTER IV.

Of the various Proceedings which may be had against Commissioners of Sewers.

WE have now shown the nature of commissions of sewers, the duties and authorities of commissioners in the execution of the office entrusted to their care, and the proceedings which they may institute in order to enforce obedience to their laws. We proceed, lastly, to mention the different remedies which may be had against the commissioners, when they exceed or mistake their authority, whether it be by the promulgation of illegal orders, by acts of oppression in the performance of their undertakings, or by neglect to carry into execution some arrangement, to the fulfilment of which they may be bound.

Several remedies are open to persons who may happen to be aggrieved by the proceedings of the officers of sewers; but the course most frequently pursued, is to move the Court of King's Bench for a writ of *certiorari* to remove the orders complained against into that Court, for the purpose of being quashed. Another method of obtaining redress is, in some instances, to move the Court for a writ of mandamus to compel the commissioners to the performance of some act, which they may have neglected. And it should be recollected, that whatever remedies may be mentioned in the progress of this inquiry as the right of the subject, he may always resort to his action at common law, if he has sustained a grievance for which a jury of his country ought to award him damages.

It has been said, that the Court of King's Bench has a jurisdiction to revise the orders and conduct of commissioners, upon many of the occasions above referred to. But this position is not so universally true, as to enable those Judges to control a new judicature of sewers. Thus, by the stat. 12 Car. 2, c. 11, it was ordained, that certain commissioners should have power to

receive claims concerning the fens of Cambridgeshire, Huntingdonshire, &c., that they should decide upon the boundaries of the same, should make decrees, and return them into the Petty Bag Office in Chancery. Writs of *certiorari* were subsequently moved for at several times for the removal of the orders of the commissioners into the Court of King's Bench; but after consulting the statute in question, the Judges resolved that no such writ should issue, and that if any had issued there must have been a *procedendo*. For here was a new judicature absolutely vested in the commissioners, with which the Court of King's Bench had no concern, as long as the statute which conferred the authority should be adhered to by the commissioners. Had they, however, neglected to pursue the requisitions of the act, the whole of their proceedings would be *coram non judice*, and so void, and the parties might enter upon that point by bringing an action at common law (*a*).

Certiorari.

Having premised thus much, we come, first, to speak of the writ of *certiorari*, as employed to check the acts and orders of commissioners of sewers. And here it should be remarked, that all the various causes for which orders may be, or have been quashed, will not be enumerated in this place. A great variety of these instances has been already mentioned in former chapters; and it is rather with the nature of the remedy, and the forms of the respective orders and of the returns to the writs, than with the intrinsic merits of the orders, that we have at present to deal. Therefore, although numerous examples might be adduced of circumstances under which the Court of King's Bench would direct orders of sewers to be quashed, such as the absence of any benefit accruing to those on whom they may have been made, the impossibility of complying with them, the want of jurisdiction in the parties making the decree, &c. (*b*); yet we shall here confine ourselves to the practical part of the proceeding. And, in the first place, it is proper to give notice of the intended motion, which must be served upon those against whom the complaint is to be made, or whose orders are to be called in question. There is a rule in the

(*a*) *Ball v. Partridge*, 1 Sid. 296; nom. *Bell v. Partridge*, 2 Keb. 82. See 2 Keb. 43.

(*b*) See *Cro. Jac.* 336; 1 *Ventr.* 67; 7 *Com. Dig.* 351.

King's Bench to this effect (*c*). And where a motion was made for the removal of orders, upon affidavits that such a course could not operate in any way to prejudice the country, the Court refused even a rule to show cause, because there was not an affidavit of notice of the motion (*d*).

It is also to be remarked, that the application must not be delayed. A party was assessed in August, 1841; he appeared to object to the presentment, and tendered a traverse in writing. The clerk, however, demurred to it for informality, as being vague and insufficient. The party then asked leave to amend, tendering a second traverse, but this was refused; and the Court gave judgment upon demurrer, to quash the plea. This was in September, 1841. A rate was made, and an order to pay it issued in June, 1842, and a distress, in respect of the same, was levied in July, 1842. On the 10th of May, 1843, a *certiorari* was moved for to remove the presentment, judgment, rate and order; but the Court considered the application out of time, and discharged the rule; being of opinion, nevertheless, that the commissioners had done wrong in not admitting the demurrer, and, at all events, that they should have allowed the party to amend (*e*). "He might have applied by mandamus after the rejection of his second traverse" (*f*). And by Coleridge, J.: "They (the commissioners) should have looked into the traverse, to see whether it would put in issue the matter proposed" (*g*).

Due intimation of the intended application having been given, the Court will grant the writ, if they see a reasonable ground for so doing. And notwithstanding a case in Keble, which at first sight may seem to be to the contrary, it is clear that the Court have been accustomed to exercise a discretionary authority with regard to these orders. A *certiorari* was prayed to remove an act of Parliament, together with certain proceedings of the commissioners of the fens, which were said to be absolute,

(*c*) 2 Hawk. P. C. 288.

(*d*) *Rex v. Butler*, 2 Barnard, K. B. 283. The notice should be served upon the clerk of the sewers. See Bunb. 61.

(*e*) *R. v. Tower Hamlets Commissioners*, 5 Q. B. 357; Dav. & M. 232.

(*f*) S. C., per Williams, J.

(*g*) S. C.

and without appeal. It was suggested, according to the report, without affidavit, that the officers had proceeded unreasonably, and the Court granted the writ as the right of the subject, saying, that they should ultimately judge, by the return, whether the commissioners had pursued the legislative power entrusted to them (*h*). This case may, nevertheless, be taken with some qualification, namely, that the right of the subject must yield to the good of the country at large. And, accordingly, it will be found that the motion for a *certiorari* has seldom, if ever, met with opposition, where no danger has been apprehended from the removal of the orders; and it is moreover customary to allege in affidavits, that no prejudice is likely to happen to the country in consequence of the application. However, upon some applications, the Court feel it impossible to grant the writ. As, where it was prayed to remove a presentment in Middlesex by *certiorari*, the Court said, that without oath made that the commissioners had refused a traverse, they would grant no *certiorari*, especially being on the view, and moreover, that on the distress for the fine, the defendant might try the matter over again in the King's Bench (*i*).

It follows from the above, that the Court will inquire into the particular facts of the case, prior to their decision concerning the issuing of the writ. And thus it was said by Holt, C. J., that, in the case of sewers, this Court (the King's Bench) inquires into the nature of the fact before they grant a *certiorari*, that no mischief may happen by inundation in the mean time (*k*), and that the Court was accustomed to be cautious in the granting of these writs, because whilst the commissioners were suspended by the *certiorari*, the country might be drowned (*l*). In this last case, which concerned the repairing of Cardiff Bridge, it had been objected, that here was a new jurisdiction erected by a new act of Parliament, the trust of the execution of which was reposed in the justices, and that the Court of King's Bench could not intermeddle with it. But the objection was disallowed, for the Court declared their power of

(*h*) *Rex v. The Commissioners of the Fens*, 2 Keb. 43.

(*i*) *Commissioners of Sewers v. Wilmore*, 2 Keb. 137; *R. v. Inhabitants of —*, in Glamorganshire. See *Id.* 469.

(*k*) 1 Salk. 146.

(*l*) 1 Ld. Raym. 580.

examining the proceedings of all jurisdictions erected by act of Parliament, so that if any encroachment were made by such newly-constituted authorities, the Court would send a *certiorari* to them, in order that the matter might be investigated, and the new Judges restrained within their proper bounds (*m*). And this position by no means clashes with the judgment in *Ball v. Partridge*, above cited, for the Court upon this occasion intimated, that they wanted jurisdiction over the commissioners then newly appointed, only so long as those commissioners abided by the act of Parliament which created them.

Again, Lord Kenyon said, upon discharging a rule for a *certiorari* to remove orders made for the erection of a new sea-wall, that the preponderance must be very strong against the propriety of orders of this sort, to induce the Court to allow of their removal (*n*). Should the matter appear doubtful upon the hearing of the case and affidavits, the Court will direct the trial of feigned issues, and will subsequently either file the return or supersede the *certiorari*, as they may see fit.

Sometimes an act of Parliament takes away the *certiorari*, as where certain commissioners under an act of Parliament were empowered to form and make sewers, and jurisdiction was given to justices at sessions, whose judgment was to be final. Still if the commissioners exceed their limits, a Court of Equity, at all events, will interfere. Commissioners are not to form and make their sewers to the injury of property which is not situated within their act (*o*).

There is one instance in which the removal of an order of sewers has been held to be of common right. The commissioners had removed their clerk, and the Court said, that here the issuing of the writ was not discretionary, as in the case of other orders, where great inconveniences might follow by inundation in the mean time (*p*). In another report of this case it is said, that the Court granted a *certiorari*, as of right, but that one of the Judges denied that a *certiorari* was a writ of

Removal of clerk.

(*m*) 1 Ld. Raym. 580.

(*n*) 3 T. R. 314.

(*o*) *Birley v. Chorlton-upon-Medlock*, 3 Beav. 499.

(*p*) *Case of the Commissioners of Sewers for Yorkshire*, 1 Str. 609.

right, for were it so, it could never be refused, but that it had often been denied by the Court (*g*). The distinction, however, between removals of orders to the prejudice of the country, and under circumstances where no detriment to the public could possibly occur, was not adverted to.

The stat. 5 & 6 Will. 4, c. 33, however, enacts (sect. 1), that no writ of *certiorari* shall issue from the Court of King's Bench at the instance of the prosecutor, or any other person except his Majesty's Attorney-General, without motion first made in the Court of King's Bench, or before some Judge of that Court, and leave obtained, as similar motions are now made on the behalf of defendants, nor unless it can be made appear to the Court that questions of unusual difficulty may arise, or that a special jury may be required (*r*).

To illustrate this point farther, we shall find that, after the granting of the *certiorari*, the Court will not quash an order for drainage or repair, without a certificate that the place in question has been cleansed or amended in conformity with the order; and they will award a *procedendo*, if the order be not so far executed (*s*). But the party who repairs shall, if he be so entitled, recover his costs for so doing from the level, and an order upon him for payment of the expenses or repairs under such circumstances would be quashed. But if, upon showing cause against the issuing of a *certiorari*, the defendants intended to rely upon the injury that could happen to the country, they must set out such facts in their affidavits, as will prove that the public are mainly interested in the question. Where the defendants merely declared, that the place to which the orders related was not repaired, but continued to be a great nuisance to the inhabitants of the town, the Court held it insufficient, because it had not been sworn, that the non-repair was injurious to the country in general (*t*).

(*g*) *Arthur v. Commissioners of Sewers in Yorkshire*, 8 Mod. 331; 7 Com. Dig. 351. It was likewise said in this case, that if one writ of *certiorari* were quashed, another might be granted.

(*r*) 16 & 17 Vict. c. 30, s. 4. Except in the case of bodies corporate.

(*s*) *Seigneur de Dunbarr's case*, 1 Sid. 78; *Rex v. Wright*, 2 Keb. 42. And see *The King and Day v. Commissioners of Sewers*, *Id.* 129; 7 Com. Dig. 351.

(*t*) *The King v. Commissioners of Sewers in Lincolnshire*, 2 Barnard, 379.

The rule for a *certiorari* is a rule to show cause, for the Court of King's Bench will not remove orders of commissioners of course (*u*).

The *certiorari* we will now suppose to have issued, and it will be remembered, that, unless there be an apprehension of some mischief, the Court will in general accede to the application. The question now before the Court is, whether the return to the *certiorari* shall be filed, or whether a *procedendo* shall be awarded. If the former event happen, the orders are quashed, because the Court cannot grant a *procedendo* after the filing (*x*); if the latter, the *certiorari* is considered to be superseded, and the validity of the orders established. The matter is, therefore, debated by counsel on either side, upon the return of the writ, and before the return is filed (*y*); and here some inquiry will naturally arise as to the sufficiency of the return.

What follows upon the issuing of the *certiorari*.

First, it may be remarked, that the Court inclines strongly against mere technical and formal objections to such a return. Thus, in a case where a *procedendo* had been awarded, because the applicant for the *certiorari* refused to consent to the repair, it was said incidentally, that the powers of commissioners of sewers are not so strict as indictments (*z*). Again, exceptions were taken to an order of sewers under the following circumstances: 1. There was an order of respite to May 1, 1666, and further order, and in the interim a fine was set, *i. e.*, in March. 2. The plaintiff was to do iron-work, after stone-work done by others, and as the latter had not yet made the stone-work, the plaintiff could not be compelled to do his share. But the Court refused to quash upon such objections, for that they were

(*u*) Anon., 2 Barnard, 151; Anon., 2 Chit. Rep. 137. It was a case concerning the removal of orders for a rate to repair Martello towers.

(*x*) Anon., 1 Salk. 145, pl. 6. The reporter adds, *Sed per Cur.* 4 Ann. B. R., "We will file them in any case where no apparent danger is likely to ensue by the delay." Which may be understood to mean, in order to reconcile it with the former position, that, supposing the invalidity of the orders to appear, the Court, nevertheless, would not quash them, if there were any danger of inundation, or other damage. See also 2 Str. 1263; 7 Com. Dig. 351.

(*y*) 2 Keb. 340.

(*z*) 1 Sid. 78.

merely misleading, and the party, if distrained upon, might replevy. To be sure, if a penalty were laid on one individual which ought to have been levied on a township, the case would be different, and the order might be quashed, but that was not the case here (*a*).

Again, it was moved upon another occasion to quash an order of the commissioners of sewers of Bromley Marsh: first, because it had been made on a bare suggestion of one of the commissioners; secondly, because none of the yeomen were mentioned; next, because it was not alleged that the defendant was chargeable. But the Court disallowed the exceptions, and refused to quash the order: and, per Windham, J., the commissioners of sewers shall have as much favour as may be (*b*). In this case the repairs required appeared to have been indispensable, and the Court likened the emergency of the occasion to the pulling down of a house upon an alarm of fire.

The following exceptions were made to a return upon another *certiorari*, to one of which the Court seemed inclined to yield. Commissioners having made a certificate, it was objected, 1st. That it did not appear that the certificate was under the great seal of England, according to the requisition of the 23 Hen. 8. 2ndly. That the certificate did not express the names of the jurors, nor show that twelve had been sworn, who made the presentment. 3rdly. That although the plaintiff had been presented for that he ought to repair a wall, yet that it had not been said for what cause, whether by reason of his land, by prescription, or otherwise. 4thly. That although the presentment stated the want of reparations, it did not show that the place to be repaired lay within the level and commission. 5thly. That there was an assessment upon the plaintiff in respect of the above wall; and of another, in respect of which latter there had been no presentment. 6thly. That the tax had been laid upon the person, instead of the land. 7thly. That no notice of the assessment had been given to the plaintiff. These, although some others, which do not seem tenable, were taken,

(*a*) The King and Heart v. Commissioners of Sewers in Lincolnshire, 2 Keb. 339.

(*b*) The Inhabitants of Bromley and East Marsh, at Blackwall, 1 Keb. 4.

were the chief objections; and with regard to the exception, that there was no mention of the commission under the great seal, Kelyng *arguendo*, said, that an order had been adjudged insufficient for that cause, in a case which he then cited to the Court (c). The Judges thought many of the exceptions valid, and especially that which suggested the want of the words *virtute literarum patentium*. The matter was postponed, however, in order to hear counsel on the other side (d).

It may be added here, that if it be wished to amend a return to a writ of this nature, the proposed alteration must be made during the term in which the return was made. Thus, in a case where several exceptions had been made to a return, it was moved to amend it. But the Court said it could not be, because the return had been made in the term before. And it was ordered, that cause should be shown on a future day, why the return and proceedings should not be quashed (e).

But supposing that commissioners (and such a case has occurred) should pay no attention to the writ of *certiorari*, and make no return, the course is to proceed against them in the King's Bench, and they will be punished for their disobedience. For instance, one Smith and others, commissioners of sewers, received a *certiorari* for the removal of their orders. They would not at first allow the *certiorari*, but, nevertheless, having afterwards allowed it, they proceeded *de novo* upon the same matter, and made another order, which being resisted, the commissioners fined the parties disobeying the order 10*l.* each. A second *certiorari* was then taken out and delivered to the commissioners, but even after that they imprisoned persons for not executing and obeying their warrant made upon their second order, and fined them 5*l.* each for speaking contemptuous words concerning the commissioners. Their plea was, that they had acted under the advice of their counsel, who was reprimanded, being then in Court, and the commissioners were sent to prison.

Disobedience
to *certiorari*.

(c) Hunger's case, 14 Car. in K. B.; S. C., nom. Hungate's case, cited Sty. 85; S. P., *Allen v. Carter*, cited Sty. 85; Rayl and Mannings' case, cited *ibid.*; S. P., *Rex v. Apsley*, Sty. 85; Semb. S. C. as that next cited *infra*.

(d) Anon., Mar. 123, pl. 202.

(e) *Rex v. Apsley*, Sty. 85.

Having made and filed the return, they were in about a fortnight afterwards called up to receive the judgment of the Court, and were fined for their misconduct, all the Judges agreeing, that the officers in question had committed a great offence and contempt (*f*). And by Twisden, J., "I have known, that upon an unmannerly receipt of a prohibition, they (commissioners of sewers) have been bound to their good behaviour" (*g*).

Again, in the well-known case of Sir Anthony Mildmay and others, it appeared that actions had been brought against them, as commissioners of sewers, for supposed illegal acts in the execution of their office, and that one of the persons who had brought his action, and obtained judgment, had been called before the commissioners, and urged to release his suit; and, upon his refusal to do so, had been committed to prison. The Court, upon ascertaining these facts, were very indignant against the commissioners, and fined one of them 200*l.*, Sir Anthony Mildmay having feigned sickness, and being absent (*h*); and Sir Anthony experienced considerable difficulty in pleading his pardon upon a subsequent occasion, the Court observing, when at length they allowed it, that he must be more careful for the future, and take heed of running into such offences (*i*).

However, the *certiorari*, it will be observed, does not remove the commission, but only the particular orders complained against. So that where commissioners had made a new order after a *certiorari*, and had fined a party for disobedience to it, the Court said, that commissioners might proceed upon the commission notwithstanding the *certiorari*, and that no attachment should issue against them (*k*); thereby intimating, that, provided they did not proceed upon the order appealed against, the officers of sewers might still continue to exercise their powers under their respective commissions.

(*f*) Smith's case, 1 Ventr. 67; Rex v. Smith and Others, Commissioners of Sewers, 1 Lev. 288; 1 Mod. 44; 2 Keb. 635; Tho. Raym. 186. See also 1 Ld. Raym. 469; 7 Com. Dig. 351.

(*g*) 1 Mod. 45.

(*h*) Hetley v. Boyer, Mildmay and Others, 2 Bulstr. 197.

(*i*) The King v. Sir Anthony Mildmay, 2 Bulstr. 299.

(*k*) The Protector v. Bruster, Sty. 445.

It will be readily perceived, that the course usually pursued upon these occasions of neglect or contempt, is to move for an attachment against the commissioners offending. And so it is, if it be intended to punish these officers for any other malversation in their offices, although, as we shall see presently, other remedies are sometimes open to the subject.

The *certiorari* and return being now before the Court, the next proceeding is, as we have before said, either to quash or confirm the orders; and it may be added here, that the orders may be quashed as to part, and confirmed as to the rest. Thus, in a case where three exceptions were taken to an order of commissioners, the Court, although as to one point they held the order void *pro tanto*, yet confirmed it against the two other objections, saying, that the order might be confirmed for part, and void for part (*l*). What done upon the return of the *certiorari*.

The objections being decreed invalid, a *procedendo* is awarded. Procedendo.
A *procedendo* will be awarded if the defendant does not, upon suing out his writ of *certiorari*, enter into the recognizances under 5 & 6 Will. 4, c. 33, whatever might have been the contrary practice (*m*). Upon one occasion, on the motion to file certain orders, the commissioners agreed to try any issue that the defendant could take respecting them; and upon the refusal of the defendant, the Court inclined for that reason to grant a *procedendo*. However, on consideration, they thought they could not refuse to hear the objections, although they would not permit the order to be filed, because it might remain in their power to send the orders back (*n*).

On the subject of costs, it may be observed, that they lie in the discretion of the Court; and Hawkins states it to be the rule, that if the *certiorari* prove groundless, the Court will decree costs against the prosecutor of it (*o*). Costs.

The *certiorari* to remove orders of sewers issues from the Motion in the Exchequer to discharge fines.

(*l*) *Inhabitants de Oldbery v. Stafford*, 1 Sid. 145; 7 Com. Dig. 351.

(*m*) *R. v. Baker*, 28 L. J., Q. B. 377.

(*n*) *Rex v. Sir Robert Cann*, 2 Str. 1263.

(*o*) 2 Hawk. P. C. 228, c. 27, s. 34.

Court of King's Bench, and thus we must understand a case in the Exchequer, where it was said, that no *certiorari* would lie originally to remove their order. It was moved to discharge fines which had been set by certain commissioners of sewers, and it was ordered that they should show cause on notice to the clerk of the sewers; though it was doubted, adds the reporter, whether this could be done by motion, because it was a judgment of commissioners (*p*).

But the Court of Exchequer will not interfere to settle points which may be easily raised, by removing the orders of commissioners of sewers into the Court of King's Bench. So that upon a motion to discharge certain fines and amerciaments imposed by the commissioners of sewers for Somersetshire, and estreated into the Exchequer, that Court refused to enter upon a discussion as to the validity of the practice of the Court of Sewers upon a disputed question. It appearing, however, that one of the fines sought to be discharged had been imposed upon a juryman for refusing to be resworn, he having contended at the session of the commissioners that every juryman was compellable to serve for life, or until discharged, and consequently that he ought not to be resworn, and the Court finding the usage to be so, discharged the amerciamment as to him without costs. And Alexander, C. B., observed, that had this been a refusal to serve, the case would have been different; but here the commissioners had mistaken their course, because the reswearing was admitted on all hands to have no foundation by usage (*q*).

Præmunire.

Another method which was formerly adopted to punish commissioners of sewers for misconduct, was by an indictment for a *præmunire*, and Sir Anthony Mildmay was actually proceeded against in this form (*r*). But as this severe punishment has fallen into disuse, it has not been thought necessary to allude farther to it, than to mention the above case. Sir Anthony was indicted upon 27 Edw. 3, c. 1, for a high contempt, for committing an individual to prison, because he refused to release a

(*p*) *Rex v. Bishop and Others*, Bunb. 61.

(*q*) *Ex parte Taylor*, 3 Y. & Jer. 91.

(*r*) *The King v. Sir Anthony Mildmay*, 2 Bulstr. 299; Cro. Jac. 336; and see 1 Mod. 45, per Twisden, J.; 7 Com. Dig. 351.

judgment obtained against some of the officers of sewers, for an illegal distress of his cattle.

Although the Court will not grant a mandamus to commissioners to make any alterations, or do other acts specified in the writ, without good cause shown, yet there are occasions upon which this course is the only efficient remedy. As where the Bristol Dock Company made certain changes in the construction of the sewers of Bristol, but so as to occasion a nuisance to the neighbourhood through the offensiveness of the sewage discharged: here the Court awarded a mandamus, and holding the return on the part of the company to be insufficient, subsequently directed a peremptory writ to issue (*s*). Upon another occasion, a writ of mandamus issued to the commissioners of sewers for Somerset, requiring them to direct a rate to be levied on the level, for the reimbursement of certain persons; but here the commissioners were successful, having made a special return to the satisfaction of the Court (*t*). Mandamus.

It is not sufficient to deny the allegations of a mandamus in the words of an act of Parliament. Some sufficient reason must be given why the writ should not be obeyed. Thus, a local act directed that a certain sum of money should be paid to commissioners in order to execute certain works which from time to time should be deemed necessary. A mandamus, reciting this clause, was moved for, stating that the money had been so paid, and requiring that the commissioners might be compelled to put certain works into repair, &c., according to the words of the statute. The commissioners made a return, that they had done the necessary works, and thus followed exactly the terms of the act. The Court held this an insufficient return, and awarded a peremptory writ (*u*).

A mandamus to inspect books was refused under the following circumstances: an owner of land disputed the legality of a joint

(*s*) *The King v. The Bristol Dock Company*, 6 B. & C. 181; 2 D. & R. 700.

(*t*) *The King v. The Commissioners of Sewers for Somerset*, 9 East, 109; 3 Smith, 105.

(*u*) *R. v. Ouze Bank Commissioners*, 3 Ad. & El. 544.

rate made in two separate divisions, and gave notice to the commissioners that he should move for a *certiorari* to quash it. The Court refused a mandamus to allow him to inspect all commissions, plans, &c., as he had already been permitted to see all documents relating to the rates on the united level (*x*).

Mandamus will not lie to the local authority at the suit of a party grieved, under 18 & 19 Vict. c. 121, s. 14, for refusing to enforce steps to cleanse a drain (*y*).

A mandamus was held bad :—

1. For not showing that a reasonable time had elapsed.
2. That there was a present duty to drain the particular spot.
3. That the consent of the Metropolitan Board had been obtained (*z*).

So again, against the same parish, the writ failed for want of a sufficient demand and refusal (*a*).

Actions.

It has been remarked, that whatever remedies may be adopted against commissioners of sewers, the common law right of action still remains, if the subject think fit to redress his grievance, whatever it may be, by damages. There is an instance in the reign of Hen. 4, where the Abbot of Glastonbury brought trespass against the defendant for entering into his royalty, and taking his beasts at Wells. The defendant justified under commissioners of sewers, but the Court gave judgment that the lands in the hands of the abbot were discharged (*b*). And since that time many actions have been prosecuted against commissioners with success. But although we cannot profess to enter upon the various grievances, for which actions on the case, or of trespass, may be maintained against commissioners, our principal object being to enumerate and set forth the remedies which may be had, yet one important decision upon this

(*x*) *Rex v. Commissioners of the Tower Hamlets*, excluding *St. Katharine's* and *Blackwall Marsh*, 3 Gale & D. 92 ; 3 Q. B. 670.

(*y*) *Ex parte Bassett*, 7 El. & B. 280 ; 26 L. J., M. C. 64.

(*z*) *R. v. St. Luke's, Chelsea*, 31 L. J., Q. B. 50 ; 1 Best & Sm. 903.

(*a*) *Ex parte Champ*, 20 J. P. 756.

(*b*) 11 Hen. 4, 34.

subject occurred a few years since, which especially claims our attention in this place.

The plaintiff brought an action on the case as owner of the reversion of a house, in the parish of St. Clement Danes, against the defendants, who were employed under the commissioners of sewers, for damage done to his house. There were two questions in the cause. The first was, whether a sufficient description of the intended action had been conveyed by the notice; and the next respected the extent of the liability of the commissioners. The notice stated that the action was brought, "for that the defendants did by themselves, their servants or workmen, make, alter, cut, dig, work and enlarge, certain sewers, gutters, ditches and works then being and running under, through, or adjoining, or near unto a certain messuage or tenement, shop and premises of the plaintiff, situate and being, &c., in the tenure or occupation of E. H., his tenant, in so negligent, incautious, unskilful, improvident and improper a manner, that the said messuage or tenement, shop and premises, or the greater part thereof, fell and were greatly damaged, weakened and destroyed, and rendered unfit and dangerous for use or habitation." It was objected to this notice, that it did not contain an account of the specific mischief which in reality occasioned the damage in question, and consequently that the notice was calculated to mislead the defendants. But as to this, the Court held, that a notice of this kind ought not to be construed with great strictness, because the object of such an intimation is simply to inform the defendants of the substantial grounds of the case, and not of the mode by which the injury was sustained.

Then, secondly, as to the extent of the commissioners' liability, the facts appeared to be these: the sewer, which it was found necessary to repair, passed close to five houses adjoining that which belonged to the plaintiff; and a stack of chimneys belonging to one of those house was built upon the arch of the sewer. It became necessary to rebuild the arch in the progress of the work; and in order to support the chimneys in the mean time, a transverse and two upright posts were placed under them for the purpose of support. The chimneys, however, fell,

and the adjoining houses, including that of the plaintiff, fell also. Moreover, the witnesses for the plaintiff were of opinion, that if raking shores had been placed externally to support the chimneys, in addition to the props already mentioned, the accident would not have happened; while those for the defendant contended, that no skill could have averted the fall of the chimneys. No specific notice had been given to the owner of the house of the dangerous state of the chimneys, but a general notice had been given to the inhabitants, to secure their houses while the sewer was in the course of repair. And, further, the commissioners of sewers had contended, that the owners of the houses had incurred the obligation of securing their own houses, whilst the owners, on the other hand, considered that the commissioners had acted at their peril. The jury having found negligence on the part of the defendants, and having returned a verdict for the plaintiff, a rule was obtained for a new trial, and it was urged for the defendants, that they had acted *bonâ fide* in the discharge of a public duty imposed by law, and that an action could not, therefore, be maintained against them. They had acted for the best, and used all the skill which they possessed. Besides, the damage arose from the improper construction of the stack of chimneys which rested on the arch of the sewer, and the houses would have fallen in a short time from the decay of the sewer, whether the defendants had done any repairs or not. Notwithstanding, the Court discharged the rule, thus giving judgment against the defendants. The question had been fairly left to the jury, and they had found that the defendants had conducted themselves negligently, and whether the chimneys might or might not have been saved by shoring, still it was the duty of the defendants to have given a specific notice to the owners of the danger which was apprehended, and in the absence of such notice, they could not be otherwise than responsible (c).

A sewer had been commenced under a local act, which ordained that no ditch, &c., should be arched over without the consent of the trustees under the act upon pain of a forfeiture of 50*l.* A surveyor of the highways, however, ordered this

(c) Jones v. Bird and Others, 5 B. & A. 837; 2 D. & R. 497.

ditch to be continued, without such consent, and debt was brought against him. His defence was, that the sewer had been begun before he took any part in it, and that he was, in fact, the servant of those for whom the work was done, and, therefore, could not be liable. But the Court were clearly of a different opinion, and a rule which had been obtained for entering a nonsuit was discharged (*d*).

The defendant had been employed by commissioners of sewers to make a sewer in a public highway. The plaintiff declared against him for keeping and continuing in his custody and care certain iron gratings belonging to the sewer, without placing a light to show the gratings. The jury found that the defendant was not guilty of keeping the sewer as alleged. The rule for a nonsuit was made absolute. 1. The custody and care were immaterial. 2. The fact of the gratings being in such custody and care was not admitted upon the plea of not guilty (*e*).

There was a single outlet from a mews, and commissioners of sewers made a trench there, upon which a cabman who persisted in leading his horse out, met with an accident. Case being brought, the defendants justified under the commissioners. Replication *de injuriâ*. The opening was not fenced, but notice thereof had been given to the occupiers of the stables. The evidence, however, as to express warning, was contradictory. The defendants, indeed, pointed to the outlet on one occasion, but were not present when the plaintiff ran the hazard in question. The jury gave 20*l.* damages, the value of the horse which was killed, and the rule for a new trial was discharged. The Court said, that if the danger was so great as that no sensible man would have passed through, the verdict should have been for the defendant; but that the plaintiff was justified in running a moderate risk. The jury seemed to have disbelieved the evidence as to caution (*f*).

(*d*) *Woodward v. Cotton*, 1 Cr., M. & R. 44.

(*e*) *Grew v. Hill*, 18 L. J., Ex. 317; 3 Ex. 801.

(*f*) *Clayard v. Dethick*, 12 Q. B. 439; and *Proctor v. Harris*, 4 C. & P. 337; *Drew v. New River Company*, 6 C. & P. 754; *Harling v. Cooper*, 8 C. & P. 473, were cited.

Another case as to liability may be inserted here. Case was brought against the commissioners of a navigation. They might be sued in the name of their clerk, but were not to be personally liable, nor liable for any damages incurred in executing the act. A contract had been agreed upon at a regular meeting by a majority. Three only were named in the contract as parties to it, and by none of these parties was it executed, nor did it otherwise appear that the contract had been regularly entered into, but the contract recited the resolution which had been come to at the meeting. It was held, under these circumstances, that the commissioners would be liable for negligent damage done by their contractor in execution of that contract (*g*). However, the case was that the plaintiff's orchard became overflown by drains, and the contractor had done this. There did not appear to have been any attempt made to prevent the mischief by securing the drains from bursting, and the contractor had turned in the water without authority. The question was whether this could be called a work done in the execution of the contract under the act. The Court said, that if the work were strictly done in pursuance of the act, and if the defendants, the commissioners, had improperly let in the water in pursuance of such contract, they would be clearly responsible. But here the contractor being a person carrying on an independent business, had acted without authority; the work was specified and described, and was not one which the surveyor of the commissioners was empowered to do. The defendants, therefore, were not liable for this conduct of their contractor, and the rule was made absolute for entering a nonsuit (*h*). And the opinions of Lord Tenterden, and Littledale, J., in *Laugher v. Pointer* (*i*) (where the Court was divided), were said here to be the more correct judgments (*h*). Upon another occasion, trespass was brought for taking the plaintiff's goods, and the defendant justified under the commissioners of sewers for the Tower Hamlets. It appeared, that a jury had presented, that the lands in question had been benefited by the sewers, and that the owner had

(*g*) By Lord Denman. The work done under the contract was work done by them as commissioners.

(*h*) *Allen v. Hayward*, 7 Q. B. 960; 4 Railw. Cas. 104.

(*i*) 5 B. & C. 547.

(*k*) 7 Q. B. 960, *ubi supra*. And see *Dawson v. Paver*, 5 Hare, 415; 4 Railw. Cas. 81.

been summoned, that he had neglected to traverse the presentment, and that a distress had consequently issued. Lord Ellenborough was of opinion, that these facts formed a sufficient answer to the action, but he reserved this and the other points to be argued in a special case. The matter, however, was afterwards compromised (*l*).

A local board may be sued for negligence in constructing a sewer (*m*), and likewise for not cleansing a sewer and gully, and so keeping them. The plaintiff's premises were overflowed with foul water through a violent storm of rain. The defence was, an unusual storm, and that the plaintiffs had thrown their refuse into the sewer. This evidence was deemed admissible, but no answer to the declaration. The sewers were vested in the defendants (*n*).

By 3 & 4 Will. 4, c. 22, s. 57, commissioners of sewers may be sued in the name of any one commissioner, or in the name of their clerk, either at law or in equity; and no action shall abate or be discontinued by reason of the death, resignation or removal of the commissioners, or of their clerk, or of the expiration of the commission. Provided that no execution shall issue against the commissioners or clerk until six months after final judgment(*o*). However, the commissioners, or their clerk, may be reimbursed their costs, upon any occasion of their being sued or prosecuted, as we have already seen (*p*). And such clerk, as we have likewise mentioned, may be a witness, although he be a defendant (*q*). And again, as we

(*l*) *Warren v. Dix*, 3 C. & P. 71.

(*m*) *Southampton Proprietors v. Southampton Local Board*, 28 L. J., Q. B. 41.

(*n*) *Meek v. Whitechapel Board of Works*, 2 Fost. & F. 144; *Brown v. Sargent*, 1 Fost. & F. 112; *Ruck v. Williams*, 3 Hurlst. & N. 308; 27 L. J., Ex. 357. The defendant contracted with H. to do certain works, under 18 & 19 Vict. c. 120, s. 77. Here H., not the defendant, was liable, and there was nothing in the 110th and 111th sections to make him responsible. *Gray v. Pullen*, 32 L. J., Q. B. 169. By 18 & 19 Vict. c. 120, the board were enabled to make sewers, &c., making compensation, with a provision as to the mode of estimating the damage. A. sustained damage through a contractor acting under the board. An action lay against the contractor. *Clothier v. Webster*, 12 C. B., N. S. 790; 31 L. J., C. P. 216.

(*o*) *Ante*, p. 223.

(*p*) *Ante*, p. 224.

(*q*) *Ibid*.

have also seen, there is no objection to the competency of any witness, by reason of his being rated (*r*).

Commissioners of sewers may, for the most part, justify generally, as that they took the distress in question for a certain tax assessed under the commission. But this form will not be sufficient as against the Crown, in an information of intrusion (*s*).

Continuing damage only happens where each day brings a succession of injury, not where the damage remains perpetually the same. The defendants dug a sewer, under the Brighton Improvement Act and in so doing cracked the walls of the plaintiff's house. The plaintiff having recovered, it was moved to enter a nonsuit, on the ground that the action was too late, as it had been brought above six calendar months after the crack. It was said that the defendants had admitted a continuing responsibility by shoring up the plaintiff's house; and Gaselee, J., observed, that this was the only point in their favour, but the Court held that the rule must be made absolute. As to the shoring, supposing that to have been injurious, it was not comprehended in the notice of action, nor in the declaration, and, therefore, was out of the question; so that, there being no repetition of mischief in respect of the crack, the proceedings came too late. And Mr. Justice Gaselee, who tried the cause, admitted that he had not sufficient doubt to induce him to divide the Court (*t*).

Notice of
action.

A local act, 57 Geo. 3, c. 29, required twenty-one days' notice of action* to be given to the clerks of the commissioners of sewers or trustees, &c. An action was commenced against a contractor for the removal of dust, who was appointed by the London commissioners of sewers, for seizing a cart (which the defendant considered as a dust cart), and for assaulting and imprisoning the driver. The Court held, that the plaintiff must

(*r*) *Ante*, p. 225. And see 6 & 7 Vict. c. 85, s. 1, partially repealed by 13 & 14 Vict. c. 99, *quod vide*.

(*s*) Attorney-General v. Donaldson (*Re Kensington Palace*), 10 Mees. & W. 117.

(*t*) *Lloyd v. Wigney and Others*, 6 Bing. 489.

* The stat. 3 & 4 Vict. c. 97 (*The Uniformity of Process Act*), by sect. 4, requires a notice of one calendar month.

be nonsuited, for want of the due notice of action prescribed by the statute, being of opinion, that the clause applied to the case then upon trial (*u*).

And by the stat. 11 & 12 Vict. c. 63, s. 139 (the Public Health Act), a notice of one month, which means calendar month (sect. 2), is required, before an action can be brought against any officer of the board of health, for anything done under the provisions of the act. The action must be brought within six months next after the cause thereof, and not afterwards. The venue must be in the county where such cause of action occurred. The defendant may plead the general issue, and give the special matter in evidence. And tender of amends with the usual incidents is allowed.

However, by sect. 140, no person acting under the board, in pursuance of the act, shall be personally liable, and any expense incurred shall be paid out of the general district rates. All persons acting *bonâ fide* under the direction of the commissioners are absolved from personal liability (*x*).

By sect. 138, the local board of any noncorporate district may be sued in the name of their clerk; and there shall be no abatement nor discontinuance by reason of the death, resignation, or removal of the clerk, or of any change or vacancy in the local board; and the clerk shall be fully reimbursed all his costs and expenses out of the general district rates.

And generally, with respect to notices, the 150th section of the act provides, that any summons, notice, writ or proceeding of any kind, which is to be served upon the Local Board of Health, may be so served through the post office, by being left there, or sent through it, directed to the local board at their offices, or by being delivered to the clerk there personally. Again, with reference to an owner or occupier, the description of notice to him as "owner" or "occupier" of the premises, (naming him,) shall be sufficient, without further name or

(*u*) *Breedon v. Murphy*, 3 C. & P. 574.

(*x*) *Ward v. Lee*, 26 L. J., Q. B. 142; 7 El. & Bl. 426.

description. This last notice shall be served personally, or delivered to some inmate of the place of abode where the owner or occupier dwells; or, in the case of the occupier (and also in case of the owner, if his place of abode be unknown), upon any inmate of the premises mentioned in the notice. If the premises be unoccupied, the notice, if to be served upon the occupier, shall be fixed upon some conspicuous part of the premises. And so, likewise, if the notice be required to be served upon the owner, and his abode be unknown. Yet, if the owner live out of the district, a notice to him through the post shall be sufficient.

Tender of
amends.

By 24 & 25 Vict. c. 133, s. 53, if before action brought, sufficient tender of amends be made, the plaintiff shall not recover. If no such tender be made, the defendant may, by leave of that Court, pay money into Court, to abide the verdict.

By 12 & 13 Vict. c. 93, s. 4, the commissioners of the metropolitan districts might make compensation for any damage or loss caused by accident or failure of works under their control, although such compensation might not be recoverable at law against them (z).

Injunction.

The Court of Chancery, regarding the writ of *certiorari* from the King's Bench as an efficient and summary remedy against commissioners of sewers, has refused to grant an injunction under the following circumstances. The commissioners ordered the plaintiff to remove a float, under a penalty, which, on his refusal to remove, was levied by distress, and upon that he brought his bill, praying a perpetual injunction. The bill alleged, that the water had not been raised higher than before, and that there would not be sufficient for navigation at a less height. The answer insisted upon the jurisdiction of the commissioners to remedy the injury to the adjoining lands from the increased height of the water, and submitted, whether the

(z) This act is repealed. With regard to private sewers, which do not belong to this work, it may just be said that if the owner of land, where there is a house, constructs a sewer improperly upon another part of the land, and lets the house thus injured by his act, he is liable to an action. *Alston v. Grant*, 3 El. & Bl. 128; *Tenant v. Golding*, 2 Ld. Raym. 1080, Holt, C. J., approved by Lord Campbell.

Court of Chancery had any jurisdiction; and whether, supposing that the proceedings of the commissioners had been illegal, the plaintiff ought not to have applied to the Court of King's Bench. The Lord Chancellor said, that he had examined the matter with great attention, and that he had found that the Court of King's Bench always exercised due caution before they interfered with commissioners of sewers, that the application to that Court was a much shorter course than the present plaintiff had adopted, and that, without deciding whether there might not be cases in which a Court of Equity would interfere, the plaintiff ought, on this occasion, to have sought his remedy at law. The injunction was accordingly dissolved (*a*). So, again, an injunction was asked by the local board of Sheerness against the Secretary of War, by reason of his filling a ditch there with soil, to which, it was alleged, Sheerness was entitled. But no danger being threatened to the people there, the Vice-Chancellor refused the motion, for the "real objects of all parties were in common" (*b*). But an injunction has been granted against commissioners under a local drainage act, to prevent them from signing their final award, and proceeding to enforce the payment of costs, although the act gave jurisdiction to the quarter sessions (*c*).

On the other hand, an injunction was granted to commissioners of sewers against a railway company, who were meddling with a natural deposit of beach protecting the level from the inundations of a tidal navigable river. It was no answer to say that the lord of the manor had sold the spot to the company under an act of parliament (*d*).

Case was brought for obstructing a watercourse. The obstruction was denied, and the right was traversed. Compensation had been offered and refused. After a vain attempt during four years to come to a settlement, it was moved by the defendants to set aside the Judge's order of reference, and to

Arbitration.

(*a*) *Kerrison v. Sparrow*, 19 Ves. jun. 449; *Coop. Ch. C.* 305. See *Cust. Oxford v. Everett, Cary*, Rep. 27. How Commissioners of Sewers are to be named in Chancery, see *Beames's Ord.* 42, and *Id.* 43.

(*b*) *Felkin v. Lord Herbert*, 30 L. J., Ch. 604.

(*c*) *Armitstead v. Durham*, 11 Beav. 556. The Lord Chancellor attached the condition of bringing money in Court.

(*d*) *Crossman v. Bristol, &c. Railway Company*, 11 W. R. 981.

add a plea under 22 Hen. 8, c. 5, which plea would defeat the action. It appeared that some imposition had been practised on the commissioners of sewers by the plaintiffs' predecessors. But it was answered, that it would be hard upon the plaintiffs to suffer for the fault of those who had gone before them. The Court said, that the commissioners should abide by the first offer, and then, upon the plaintiffs' refusal, the rule might be made absolute, and the plea added. No costs on either side (*d*).

An action was brought against the clerk to a commission of sewers, for damage done to the house of the plaintiff by the improper construction of a sewer. The case was referred to arbitration. The arbitrator reported in favour of the commissioners, that they had done their work skilfully by tunnelling, but that less risk would have happened, had the sewers been made by open cutting, instead of tunnelling. The commissioners were held not liable (*e*). Again, the Metropolitan Board of Works in making a sewer, cut a high road contiguous to the lands of the plaintiff, so as to destroy the water of an ancient spring, and lay dry a rivulet and some ponds, extending three quarters of a mile. The landowners filed a bill, claiming a right to the spring from time immemorial. The Court refused to restrain the defendants, or to compel them to make the sewer water-tight, or to do any act to restore the ancient water. Although they might require compensation for the damage, the plaintiffs had no remedy in equity (*f*). The landowners then obtained a mandamus for compensation, but on the authority of *Chasemore v. Richards* (*g*), *Wightman and Mellor, Js.* (Cockburn, C. J., *contra*) held, that no compensation could be claimed (*h*).

Arbitration
under 11 &
12 Vict.

In cases of compensation under the Public Health Act, there may be a reference to arbitration, and an umpire may likewise

(*d*) *Medley and Others v. Pritchard and Another*, 6 Bing. N. C. 442. And see further as to compulsory arbitration, 21 & 22 Vict. c. 98, ss. 69, 70, 74.

(*e*) *Grocers' Company v. Donne*, 3 Bing. N. C. 34.

(*f*) *Stainton v. Woolrych*, 26 L. J., Ch. 300; ——— *v. Metropolitan Board, Lewisham*, 23 Beav. 225.

(*g*) 29 L. J., Ex. 81; 7 H. L. Cas. 349.

(*h*) *R. v. Metropolitan Board*, 32 L. J., Q. B. 105; 9 Jur. (N. S.) 1008; see *R. v. Bullock*, Times, June 10, 1864.

be named. The reader is referred to the sections of the act which provide for these matters (*i*). The arbitration under 11 & 12 Vict. c. 112, s. 69, was held not to reach cases in which the commissioners dispute altogether the right to compensation. The limit was as to the *amount* (*h*). c. 63 (The Public Health Act).

There were two records upon presentments removed by *certiorari*. The defendant entered his record first. The prosecutor then entered his. It was held, that the latter could not of right have his record tried first, but that the cases must be taken in order as entered (*l*). Trial.

The defendant was convicted of obstructing a public sewer. Upon a motion for a new trial, it was held, that he needed not to be present in Court. He was not liable to a personal punishment, only to a fine (*m*). New trial.

(*i*) Sections 123—128, inclusive, and 21 & 22 Vict. c. 98, ss. 69, 70.

(*h*) *R. v. Metropolitan Commissioners*, 22 L. J., Q. B. 234; 1 El. & Bl. 694.

(*l*) *R. v. Leigh*, 7 C. & P. 813, per Bolland, B.

(*m*) *R. v. Parkinson*, Den. & P. 459.

CHAPTER V.

Of the Drainage Acts.

WE have now gone through the law of public sewers and public drainage. A work, however, upon that subject would seem to be incomplete, unless the Acts of Parliament which agricultural improvements have rendered necessary were to be noticed. These, for the most part, relate to private water-courses and drainage. Their origin was a desire to accommodate tenants for life, and persons under disabilities, by conferring powers upon individuals so as to enable them to bring the lands entrusted to their care into a better state of cultivation through drainage. The usefulness of the system, and the increasing regard for farming improvements, together with rising ideas of sanitary reform, soon induced the government to hold out temptations for these purposes by loans of money, to be repaid within certain limits of time, and upon certain conditions.

And these views being to a great degree seconded by the owners of land, a general measure relating to drainage was soon introduced, under which considerable facilities are afforded to all persons who may be desirous of augmenting the value of their estates by a more efficient drainage.

It may be the most convenient course to set out these statutes respectively. And first, with regard to 3 & 4 Vict. c. 55, "An Act to enable the owners of settled estates to defray the expense of draining the same by way of mortgage," which is the first upon the subject, it may be observed, that although the proceedings under it were protected by the act which followed it soon afterwards, provided they should be completed under the new act (*a*), yet the act itself was entirely repealed by

(*a*) 8 & 9 Vict. c. 56, s. 2.

the 8 & 9 Vict. c. 56. It was a very short statute, consisting of but five sections, the first of which permitted tenants for life to apply to the Court of Chancery, by petition, for leave to make permanent improvements in their lands. By sect. 2, a copy of the petition was to be served upon the parties interested. The 3rd section empowered the tenants for life to make the proposed improvements if confirmed by the Court. The 4th enabled the Court to charge the costs of the improvements upon the estates intended to be benefited, upon certain conditions there mentioned. The 5th section allowed of amendment or repeal during the session.

The 8 & 9 Vict. c. 56, after repealing the prior act of 3 & 4 Vict. c. 55, and saving the proceedings then pending, provided that they should be completed under the provisions of the 8 & 9 Vict., goes on to enact, by sect. 3, that any tenant by the curtesy, or for his own life, or for any other life or lives, or years determinable on any life or lives, or any infant, by his guardian or next friend, or any idiot or lunatic,* by his committee, or any married woman entitled for her separate use, by her next friend, or the husband of any married woman entitled in her right, or any feoffees or trustees for charitable purposes, or any ecclesiastical or other corporation, aggregate or sole, or any incumbrancer or mortgagee in fee in possession, or any person entitled to the equity of redemption and in possession,—may apply to the Court of Chancery by petition to the Chancellor or Master of the Rolls for leave to make any permanent improvement in the land to which such person or corporation shall be so entitled, or any part thereof, by draining the same with tiles, stones, or other durable materials, or by warping, irrigation, or embankment, in a permanent manner, or by erecting thereon any buildings of a permanent kind, incidental or consequential to such draining, &c., and immediately connected therewith, and, moreover, may apply to make such

* It is proper to proceed under the Drainage Acts for the purpose of improving a lunatic's estate. The Master had allowed 148*l.* out of the lunatic's estate for drainage. The Lord Chancellor said, I cannot confirm this order. Had the son been remainderman it might have been done, but not for his brother. Why did not you proceed under the Drainage Act? You may take an order, allowing it to be advanced under the Drainage Acts. *Ex parte Clarke*, 2 Phil. Ch. Rep. 382.

improvements a charge upon the inheritance. An estate of fen land was charged by a local though public act with taxes for drainage and embankment. Of these taxes a purchaser had no express notice. It was held, that he was not entitled to compensation for such taxes (*b*).

The petition on behalf of an infant must be presented in the name of the guardian (*c*).

The petition made as above ordained by the 3rd section is to be referred to the Master, who having examined the estimates and valuations is to make his report as to the beneficial tendency of the proposal (*d*). The report is then to be filed, and if within fourteen days after filing there be no special application to review it, the Court may confirm it, upon the petition of the party, without the attendance of counsel or solicitor. Upon which the improvements may be made, and the Master may certify that any person advancing money for that end will be entitled to a charge upon the land, with interest, upon his being satisfied that the money has been duly expended in the improvements, or in obtaining the authority of the Court in respect of the same. Still, the Court may, upon the petition to confirm, refer the matter back to the Master, or may receive such evidence in support of the Master's finding or otherwise for the purpose of ascertaining the matters in issue more satisfactorily (*e*).

The Master having entered upon all these inquiries, and fully satisfied himself as to the expenses incurred and the money expended, may endorse upon the certificate those facts, and the inheritance shall, upon such finding, be deemed to be charged with interest. And such charge shall have priority over other charges, except tithe commutation rent-charges and any quit or chief rents incident to tenure, and a memorial of any such certificate charging hereditaments in Middlesex and Yorkshire, or any hereditaments in Ireland, may in all respects be

(*b*) *Barraud v. Archer*, 2 Sim. 433.

(*c*) *Stanhope v. Stanhope*, 3 Beav. 547.

(*d*) Sect. 4.

(*e*) Sect. 5.

registered, as deeds are now registered in Middlesex, Yorkshire, and Dublin, and without payment of any fee (*f*). The certificate, made as above, is to be filed in the Report Office, and a duplicate is to be delivered to the lender of the money which shall be evidence of his title, and the security shall take effect as from the granting of the certificate (*g*). By the 8th section, the rate of interest for the money advanced, and any monies remaining unpaid shall be four per cent. The Chancellor, &c., may make such orders as they may think fit for facilitating the mode of application to the Court and of the proceedings before the Master or otherwise (*h*).

Moreover, the Master may call to his aid a surveyor to report, in order to facilitate his proceeding, or he may take the evidence of the surveyor appointed by any party applying to the Court. And the Lord Chancellor, &c., of England and Ireland may appoint persons to report to or give evidence before the Master to whom the matter shall be referred (*i*).

However, it is to be remarked, that under this statute the Court will not take upon itself the jurisdiction which is thereby conferred on the Master. It was thus decided under the repealed act of 3 & 4 Vict. c. 55. The Court confirmed the report of the Master, which sanctioned the draining of a settled estate, and it then declared itself *functus officio*, for the residue was to be carried out, according to the act, not by the Court, but by the Master (*k*).

Thus far, we see, that certain persons under disabilities may have their lands permanently improved through the agency of their guardians or friends. But these improvers could not borrow money under 8 & 9 Vict. c. 56. If they were not prepared to advance the money needful for drainage from private funds, the land must have remained unimproved. Yet

(*f*) Sect. 6.

(*g*) Sect. 7.

(*h*) Sect. 12.

(*i*) Sect. 14. In Ireland the Lord Chief Baron is, by the same clause, invested with the same power as the Chancellor, and the matters confided to a Master in Chancery in England may be equally done by the Chief Remembrancer of the Court of Exchequer there.

(*k*) Ex parte Mills, 13 Sim. 591.

Owners of
land.

the advantages of drainage were so obvious as to induce the Legislature to make advances of money to all owners of land for these purposes, and, consequently, the parties of whom we have been speaking under the 8 & 9 Vict. come in for their full share of the benefits propounded by a far more general and extensive statute. That act, the 9 & 10 Vict. c. 101, has the words, "any owner of land," and the interpretation clause, (sect. 49), declares that "owner of land" shall mean such person as would be deemed an owner of land under 6 & 7 Will. 4, c. 71 (the Tithe Commutation Act). And there,* "owner of lands," by sect. 12, includes every person in the actual possession or receipt of the rents and profits of any lands (except any tenant for life or lives or for years, holding under a lease or agreement for a lease on which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever, holding under a lease or agreement for a lease, for a term which shall not have exceeded fourteen years from the commencement thereof), and that without regard to the real amount of interest of such person; and in every case in which any land shall have been leased or agreed to be leased to any person for life or lives, or for years, by any lease or agreement for a lease on which a rent less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and of which the term shall have exceeded fourteen years from the commencement thereof, the person who shall for the time being be in the actual receipt of the rent reserved upon such lease or agreement for a lease shall, jointly with the person who shall be liable to the payment of such rent of such lands, be deemed for the purposes of the act to be owner of the lands. And in every case in which any person shall be in possession or receipt of the rents and profits of any land, under any sequestration, extent, elegit, or other writ of execution, or as a receiver under any order of a Court of Equity, the person against whom such writ shall have issued, or who, but for such order would have been in possession, shall, jointly with the person in possession by virtue of such writ or order, be deemed to be for the purposes of the act owner of such lands (*l*).

* *I. e.* under 6 & 7 Will. 4, c. 71.

(*l*) See also 6 & 7 Will. 4, c. 71, s. 13. And by 10 & 11 Vict. c. 11, s. 15, in Scotland, the words "owner of lands" shall include any corporation.

Thus, the persons mentioned in the former statute, being in possession of the receipts and profits of the lands, may be considered as owners under the 9 & 10 Vict. c. 101, and entitled to the privileges of that statute.

By the 9th section of the 9 & 10 Vict. c. 101,* the inclosure commissioners for England and Wales shall be the commissioners for executing the act in question for Great Britain, and they may appoint officers or employ those already appointed under their own commission, and may remove them, and may also order allowances and expenses to be paid to them as under the Inclosure Act, the 8 & 9 Vict. c. 118. In Ireland the commissioners of public works are empowered to execute the act there, and appoint officers. Then, again, as regards lands in Great Britain, all the provisions of the Inclosure Act as to the proceedings and inquiries of the commissioners, and the authentication of instruments (*m*), shall extend to the proceedings under this act. Provided that they shall not be authorized, by summons or otherwise, to compel the attendance of any wit-

The stat.
9 & 10 Vict.
c. 101.

* The Interpretation Clause of the 9 & 10 Vict. c. 101, is as follows:—

“Commissioners,” as regards lands in Great Britain. The Inclosure Commissioners for England and Wales. In Ireland, the Commissioners of Public Works and Drainage there.

“Commissioners of the Treasury.” The Lords Commissioners of the Treasury, &c., or the Lord High Treasurer, &c.

“Court of Session.” The Court of Session in Scotland, in either division thereof, in time of session, or the Lord Ordinary officiating on the bills in time of Vacation.

“Lord Chancellor.” Also “Lord Keeper,” and “Commissioner of the Great Seal.”

“Masculine Gender.” A female as well as a male.

“Owner of Land.” As to land in England and Wales, such person, as under 7 Will. 4, c. 71, would be deemed such owner.

As to lands in Ireland, such person, as, under 1 & 2 Vict. c. 109, s. 8 (“An Act to abolish Composition for Tithes in Ireland,” &c.), should have the first estate of inheritance or other estate or interest equivalent to a perpetual estate or interest thereon.

As to land in Scotland. Every fiar, life renter, heir of entail, husband of a married woman seised in her own right, tutor, curator, and other guardian for any infant, minor, lunatic or idiot, fatuous or furious person; and every trustee who respectively shall be in the actual possession of the land, or in receipt of the rents payable on the tacks, leases, or tenancies of the tenants in the actual possession thereof.

“Person.” Any body corporate, aggregate, or sole, as well as an individual.

“Singular Number.” Several persons, &c., and several things, &c., as well as one, and the converse. By sect. 50, the act might have been amended or repealed during that session of Parliament.

(*m*) See 8 & 9 Vict. c. 118, ss. 2, 9.

ness(*n*). And as to Ireland, the powers of the stat. 1 & 2 Will. 4, c. 33, are vested for the purposes of this act in the commissioners of public works in Ireland by sect. 12. By sect. 13, every assistant commissioner and surveyor in Great Britain, and any commissioner, engineer, and surveyor in Ireland may receive declarations under the act, and examine upon declaration all such persons as may voluntarily attend upon them.

Another act, later than either the 8 & 9 Vict. c. 56, or the 9 & 10 Vict. c. 101, above adverted to, makes the same appointment of the inclosure commissioners to carry its provisions into execution(*o*). By sect. 2, all the powers given by 8 & 9 Vict. c. 118, to the assistant commissioners to require the attendance of witnesses(*p*), to administer or receive declarations and examine witnesses(*q*), and to cause to be produced before them writings and documents(*r*), and the power given to the commissioners to delegate to assistant commissioners their own powers(*s*), (except the power to do any act required to be done under the seal of the commissioners,) shall be applicable to and may be exercised for the purposes of the act in question, as fully as under the 8 & 9 Vict. c. 118. By sect. 3, the commissioners must give annually to one of the secretaries of state a report of their proceedings, and such general report shall be laid before both Houses of Parliament by the secretary of state within six months after its receipt, or, if Parliament be not sitting, then in six weeks after the next meeting thereof.

advances of
money.

The next point is that relating to advances of money. These advances are authorized to a limited extent by 9 & 10 Vict. c. 101, an act which extends to Scotland and Ireland as well as to England and Wales. But as we do not purpose here to enter upon the consideration of all the Scotch and Irish acts,

(*n*) 9 & 10 Vict. c. 101, s. 11. But a later statute (10 & 11 Vict. c. 38, s. 2) permits this power of compelling the attendance of witnesses to *assistant commissioners*.

(*o*) 10 & 11 Vict. c. 38, s. 1.

(*p*) 8 & 9 Vict. c. 118, s. 9.

(*q*) *Ibid.*

(*r*) *Ibid.*

(*s*) Sect. 10.

it may be sufficient to refer to them (*t*). They are all acts for the advancement of public works and drainage in Ireland. And, with reference to Scotland, the statutes 9 & 10 Vict. c. 101, 10 & 11 Vict. c. 113, may be consulted.

An important statute upon the general subject is 24 & 25 Vict. c. 133, Part III. of which relates to agricultural drainage, and compels adjoining owners to permit useful drains (*u*).

We proceed to the clauses of the acts for England and Wales, respecting advances. And, first, by 9 & 10 Vict. c. 101, the Commissioners of the Treasury were authorized to advance a sum not exceeding 2,000,000*l.* for Great Britain on exchequer bills to that amount, yet not to exceed two millions altogether. The 2nd section prescribes the form of the exchequer bills. The 3rd section extends the powers of the acts concerning exchequer bills to this act. The 4th section fixes the rate of interest at $3\frac{1}{2}$ *d.* per cent. per diem. The 5th section provides for the date and payment of these bills. The 6th provides for their currency. They are to be payable out of the consolidated fund (sect. 7). By 19 Vict. c. 9, if the commissioners approve of an advance, they may, with the sanction of the Treasury, issue a provisional certificate.

By the 26th section of 9 & 10 Vict. c. 101, the Governor and Company of the Bank of England shall cause a separate account to be opened in their books with the inclosure commissioners, and with the Receiver-General of Stamps and Taxes, under the title of "Drainage Advances and Repayments' Accounts." The 27th section provides for the like in Ireland. And the 32nd section empowers the commissioners, under the authority of the Treasury, to sell such exchequer bills as may be issued for their respective accounts, at the Banks of England or Ireland, and to cause the produce thereof to be placed to the drainage advances and repayment account at such Bank. And by sect. 33 of the same act, the inclosure commissioners

(*t*) 4 & 5 Vict. c. 89; 5 & 6 Vict. c. 89; 8 & 9 Vict. c. 69; 9 & 10 Vict. cc. 4, 101, 108; 10 & 11 Vict. cc. 79, 106; 12 & 13 Vict. c. 23; 13 & 14 Vict. c. 31, s. 11; 16 & 17 Vict. c. 130; 18 & 19 Vict. c. 110; 19 & 20 Vict. c. 62; 26 & 27 Vict. cc. 26, 88.

(*u*) Sect. 72, &c.

shall notify under their seal to the commissioners of stamps and taxes the particulars contained in any warrant or order for advances, with the date of the payment thereof by the Bank of England; upon which, the commissioners of stamps must cause a record to be made in the books of account in their office, to be kept upon the principle of double entry, debiting therein the land in respect of which the advance shall be made with the amount of the same, and crediting it by the rent-charge received from time to time by their officers in respect of such balance.

Moreover, by sect. 48, the inclosure commissioners and the Receiver-General of Stamps and Taxes shall cause to be made up for examination and audit an annual document, certified by them, of the amount of credits, or of exchequer bills placed to their account at the Bank of England, the sums issued thereafter upon warrants for advance for loans, and the repayments on account of such loans, to the 31st of March of each year, and shall deliver the same to the commissioners for auditing the public accounts, such accounts to be deemed public accounts, and to be inquired into and audited, and to be within the provisions of all acts passed for auditing the public accounts of Great Britain.

The 14th section provides, that every owner (*x*) of land who may purpose to improve the same by works of drainage, and may desire an advance under this act, may apply to the inclosure commissioners. The application must contain particulars of the land to be drained, of the manner of drainage, the expense, and the expected increase of value by means of the drainage. The estate or interest of the applicant in the land must also appear, and whether the advance applied for is intended to cover the whole or what portion of the expense of the works. Certain expenses are contemplated in order to investigate the propriety of advancing the money. By the 15th section, the commissioners may require security by bond or otherwise, in respect of which no stamp duty is payable (*y*), for this purpose from the owner who applies. And the like again for the repayment of expenses of inspecting and ascer-

(*x*) See as to owner, sect. 49, and 6 & 7 Will. 4, c. 71, s. 12.

(*y*) Sect. 47.

taining the due execution of the work, if the commissioners should issue a provisional certificate (z). Moreover, unless the commissioners shall otherwise direct, the payment shall not be a charge upon the land, but shall be upon the person applying, and the expenses must be paid before the issue of the certificate. By sect. 16, the commissioners (having regard to the statements in the application and to the available balance in their hands), may cause the land, and the plan (a), estimate, and specification of the proposed drainage to be inspected and examined by an assistant commissioner or surveyor, or engineer, who shall report upon the same, and if he shall be of opinion that the proposed drainage will effect an improvement in the annual value of the land beyond the annual amount which can be charged thereon under this act in respect of the advances applied for, and that the drainage is proposed, under the plan and specification, to be effected in a substantial and durable manner, he shall annex to his report the plans, estimates, and specification, or duplicate thereof; and the commissioners may make such other inquiries in relation to any such application as they may think fit.

In Ireland, the report must specify not only the denomination of the land, but also the barony and county where it is situate (b), and no stamp duty is payable in respect of any certificates under the act (c).

Then follows the provisional certificate. By 19 Vict. c. 9, s. 1, if the commissioners shall approve either wholly or in part of the advance, they may apply to the Treasury for their sanction for the commissioners to issue to the owner of the land applying, or, should his interest have determined, to the owner of the land for the time being, a provisional certificate. This certificate shall declare, that upon its being shown to the satisfaction of the commissioners, that the proposed works have been executed according to the plan (d) and specification annexed to the report of the commissioners or assistant commissioner, &c., in a substantial and durable manner, the commissioners will

The provisional certificate.

(z) See 19 Vict. c. 9, s. 1, *infra*.

(a) See 10 Vict. c. 11, s. 2, *post*.

(b) 9 & 10 Vict. c. 101, s. 30.

(c) *Id.* s. 47.

(d) See 10 Vict. c. 11, s. 2, *post*.

certify to the Treasury in favour of the advance expressed in the certificate (e), but still limited to a certain sum, to be expressed in such certificate.

Again, there may be an advance on account. For, by the same clause, such a partial advance may be made in respect of the works in part executed. The provisional certificate may so express it.

Provisional
certificate
may be
assigned.

And by 10 & 11 Vict. c. 11, s. 9, this certificate may be assigned. For any owner of land, having such certificate, or any subsequent owner, may assign it, as a security for an advance of monies for the execution of the works therein mentioned. The assignment may be made by indorsement on the certificate, in the form set forth in the schedule annexed to the act,* upon which the assignee shall be in the same situation with reference to the advance as the owner, yet subject to an account as between the owner and such assignee as far as the security. Then, subject to the rights of the assignees, each advance shall be made to the owner who has executed the work, and who shall accordingly have been named in the certificate, or to the owner's legal personal representative. And where an aggregate advance shall be made in respect of works which shall have been in part executed by an owner whose ownership shall have ceased, and in part by a subsequent owner, the advance shall be apportioned between them, as by the report of a surveyor, or assistant commissioner, shall appear reasonable to the commissioners, having regard to the sums expended by the successive owners; and such successive owners may be named in the certificate accordingly.

(e) As to a deviation from the proposed plan, see 10 Vict. c. 11, s. 2, *post*.

* FORM OF ASSIGNMENT.

"I, A. B. of in consideration of the sum of pounds paid to me [or of the advances which may be made to me] by C. D., do hereby assign to the said C. D. the within-written provisional certificate, and all my right and interest in and to the advances which may be made in virtue thereof, and that the said C. D., his executors, administrators and assigns, may claim and receive such advances, and may thereout retain the said sum of with interest for the same at per centum per annum [or such sums as may be advanced to me by the said C. D. as aforesaid] with interest at per centum per annum from the time of the respective advances thereof. In witness whereof I have hereunto set my hand this day of 18 ."

By 11 & 12 Vict. c. 119, s. 1, lands in second and subsequent certificates may be specified by reference to the first. Sect. 2 permits the cancelling of certificates. Sect. 3 relates to such cancellation in Scotland. By 13 & 14 Vict. c. 31, s. 4, the Inclosure Commissioners may authorize the application of advances to other works than those mentioned in the proviso certificate.

Then, with reference to the expenses of the investigation of the application, and of overseeing the due execution of the works, by 19 Vict. c. 9, s. 1, if the commissioners see fit, all, or a part, of such expenses may be laid as a charge upon the land in question, and may form part of the expenses of the loan. However, by 9 & 10 Vict. c. 101, s. 18, such provisional certificate shall not be issued till notice shall have been given by advertisement, for two successive weeks, in a newspaper, circulating in the county or district where the land may be situated, and also in the London, Edinburgh, and Dublin Gazette, accordingly as the said lands shall be situate in England, Scotland or Ireland; and two calendar months must elapse from the publication of the last advertisement. Then, if any person, having any estate in or charge upon the land, shall dissent in writing within two calendar months, and state the nature of his interest or charge, the commissioners shall certify such dissent to the owner of the land, and shall not issue such provisional certificate till the dissent shall have been withdrawn, or an order made by the Court of Chancery, &c., authorizing the applicant to obtain his advance.

The dissent not being withdrawn, is not by any means to be an insuperable obstacle to the improvement. For, by 9 & 10 Vict. c. 101, s. 20, if any owner of land in England or Ireland shall be desirous of proceeding, notwithstanding the dissent, he may, in England, apply by petition to the Court of Chancery, *i. e.*, the Chancellor or Master of the Rolls, and in Ireland, to the Court of Chancery, or equity side of the Exchequer. That Court may then, without counsel or solicitor, refer the matter to a Master in Chancery, or to the Chief Remembrancer, in Ireland, to make inquiries on the subject, and consider the evidence

adduced, and report his opinion. Due notice of this order must be served upon the party dissenting, and he may attend the proceedings, and the report above mentioned shall be filed. And then, if no petition be presented within fourteen days against the confirmation of such report, praying that it may be reviewed, the Court may, upon petition, and without counsel or solicitor, confirm the report absolutely; and (if the report be favourable) authorize the advance sought for. But if a petition be presented against the report, &c., the Court may either confirm the report, or refer it back to the Master, &c.; and the Court may, if it think fit, receive further evidence previous to making its order. And in order to render the proceedings as inexpensive as possible, the respective Courts aforesaid may, from time to time, make such orders and provisions in their respective Courts as they may think proper.

The Court of Session is the tribunal in Scotland where application is to be made in cases of dissent (*f*). But, inasmuch as the person dissenting is bound to give notice to the owner of the land (sect. 18), so must he also receive notice of the petition from the owner of the land. This is done by serving a copy of the petition, fourteen days at least before the hearing, upon the dissenting party, or, should he be out of the United Kingdom of Great Britain and Ireland, then upon such person as the Court to which the petition shall be preferred shall appoint. With regard to costs, the Courts aforesaid may order them to be paid by the petitioner, or by the person dissenting, if his dissent shall appear to the Court to have been vexatious and improper (*g*). Hence it follows, that if the dissent be not signified within the time and in the manner aforesaid, or if it be withdrawn, the order of the Courts is unnecessary (*h*). And, in addition to the owner's application, where the land is held in right of any church, chapel or other ecclesiastical benefice in England and Ireland, the commissioners must have the assent in writing of the bishop of the diocese, and likewise of the patron of the benefice (*i*).

By sect. 24, a saving clause is provided in cases both of ap-

(*g*) Sect. 22.

(*f*) 9 & 10 Vict. c. 101, s. 21.

(*h*) Sect. 23.

(*i*) Sect. 19.

plication and dissent, in favour of persons under disabilities whose friends are enabled to act for them. The clause enables all husbands, guardians, committees, tutors and curators for married women, infants, minors, lunatics, idiots or fatuous or furious persons, and all feoffees and trustees, judicial factors, executors and administrators, to have the same powers concerning application and dissent as such married women, &c. would have had, if free from disability, or as such feoffees, &c. would have had, if they had been possessed respectively in their own rights; but no such guardians, &c. shall be under any obligation to apply or to dissent, or be in anywise responsible for the consequences of such application, or of the charge made in pursuance thereof.

The investigation having been gone through, and the provisional certificate issued, the works commence; for although the certificate sanctions the advance, yet the work must be either wholly, or proportionally, completed first. And the commissioners may cause these works, to which the provisional certificate relates, to be inspected by a commissioner, assistant commissioner, surveyor or engineer, in order to ascertain the due execution of such works; and such commissioner, &c. may require the production of such vouchers, bills of account, or other documents, as may enable him to ascertain such due execution, and the amount of the expenses which shall have been actually incurred in the execution of such works.

But previously to our stating the actual advance of money under the act upon the completion of the work, it may be as well to refer for a moment to a subsequent statute, which modifies and renders more accommodating the provisions above set forth.

Modifica-
tions of the
stat. 9 & 10
Vict. c. 101.

Thus, upon some occasions, the plans, estimate and specification may be dispensed with (*k*). By 10 & 11 Vict. c. 11, s. 2, where by the 9 & 10 Vict. c. 101 (*l*), the plan, &c. of the proposed drainage is required to be inspected or examined by,

(*k*) See sect. 16.

(*l*) Which, as to this, is incorporated with the 10 & 11 Vict. c. 11, by the 11th section of the latter statute.

and to be annexed to the report of, the assistant commissioner, &c., it shall be sufficient for the assistant commissioner, &c., unless the commissioners shall otherwise direct, to inquire into, and to embody in his report, such particulars of the land to be drained, and of the proposed or any other manner of the drainage, and of the estimated expenses thereof, as shall appear to him necessary, in order to enable the commissioners to judge of the expediency of an advance for the works. This dispenses with the inspection and examination of the plan, &c. under 9 & 10 Vict. c. 101, s. 16. Again, where in the provisional certificate, or elsewhere, reference is, by the same act, required to be made to the plan and specification annexed to such report, reference may be made thereto, or to the said report, as circumstances may require.

Another modification is, that the applicants for advances may, at any time before the issue of the provisional certificate, withdraw, by writing addressed to the commissioners, or reduce, the amount of the advance applied for; and the commissioners may deal with the application for the reduced sum in the same manner as if such reduced sum had been that originally applied for (*m*). By sect. 4, any party so withdrawing or reducing the amount of his advance, may substitute for such application, at the time of such withdrawal or reduction, an application in respect of *other* lands. And if the advance thus applied for do not exceed the amount before applied for, either in the case of withdrawal or of reduction, the commissioners may give the same the benefit (if any) in respect of priority, to which they might have deemed it entitled if it had been made at the same time, and instead, in whole or in part, of the previous application. Nevertheless, there must be an advertisement (*n*), and all other inquiries and proceedings, in this latter case, as though it were an original application.

The 5th section consolidates applications. Thus, supposing several applications made separately either in respect of the same or of different lands, or applications for further advances, the commissioners may consolidate them, with the owner's

(*m*) 10 & 11 Vict. c. 11, s. 3.

(*n*) 9 & 10 Vict. c. 101, s. 18.

consent, either by their provisional certificate, or by any other writing under seal, and, in that case, all the certificates and documents are to be treated as if there had been one single application: a provision which saves much expense which would otherwise accrue in preparing separate instruments. Yet there must still be a notice by advertisement as before, and persons may dissent as in other cases (*o*), and the provisions as to dissent in the stat. 9 & 10 Vict. c. 101, shall apply in this case likewise.

Every preliminary arrangement having been made, and it being shown to the commissioners that the works proposed for are either wholly or partially finished, the commissioners are in a condition to issue their full certificate for the money. But, first, it may be noticed, that by 10 & 11 Vict. c. 11, s. 8, both certificates and provisional certificates under 9 & 10 Vict. c. 101, may be made in such form as the commissioners may think fit. Such certificates, likewise, are to be deemed conclusive evidence of the due carrying out of all the applications and acts previously necessary in the proceedings, and also, that an advance may be issued by virtue of such certificate, and that the land shall become charged in respect of such advance; and no such certificate or provisional certificate shall be impeached by reason of any omission or mistake therein.

And, again, in order that no doubt might exist as to the nature of certain works which should earn the advances mentioned, the stat. 10 & 11 Vict. c. 11, s. 1, after reciting the 9 & 10 Vict. c. 101, enacts, that the works following shall be deemed works of drainage, in respect of which advances may be made: 1. The expense of making or improving and securing [from or*] for the benefit of the land proposed to be improved by drainage an outfall through other land, or such part as the commissioners may think reasonable of the expense of the same, for the benefit of that or of other land; 2. The expense of making open drains and watercourses, including such as may need frequent repair, where reasonable security

(*o*) 9 & 10 Vict. c. 101, s. 18.

* *Sic* in the statute, "from or" should be left out?

for their maintenance shall appear to the commissioners to be afforded by the interests or liabilities of the tenants and occupiers of the land; and 3. The expense of fencing, trenching, and clearing the surface of land to be drained, for the purpose of converting the same from waste or pasture and into arable or tillage land, where such fencing, &c. shall appear to the commissioners necessary to secure and render productive the proposed improvement by drainage. Provided, that it shall appear to the commissioners, that in all the cases aforesaid the works will effect an improvement in the yearly value of the land, which will exceed the utmost yearly amount which can be charged thereon under the act in respect of the advance applied for.

Completion
of works.

There is also a time limited for the completion of the works. For by 10 & 11 Vict. c. 11, s. 7, no provisional certificate shall be issued, unless the commissioners shall be satisfied, either by security or otherwise, by the party applying for the advance, that the works in question will be completed within five years from the date of the certificate. And there shall be annexed by the commissioners to any provisional certificate a provision, that all works in respect of which they shall certify their opinion that an advance should be made, shall be completed within five years. And, again, no provisional certificate shall be issued in favour of the same owner for any larger sum than 10,000*l.* Nevertheless, if such security or satisfaction as aforesaid can be produced that the works may be completed within three years, and that it shall also appear, to the satisfaction of the commissioners, that such works are to be executed within any district in Scotland in which distress prevails, and that such works may be executed by the labour of the inhabitants of such district, the commissioners may, on the application of any owner, and with the sanction of the Treasury, issue a provisional certificate, or provisional certificates, for such larger sum or sums as they may see fit, subject to a provision to be annexed to such last-mentioned certificate that such works shall be completed within the said period of three years.

Advance of
money.

The provisional certificate does not produce the money. It is only an encouragement or guarantee to the owner, that when

his works are either wholly or in part completed, he shall have his advance. The advance itself is made by virtue of another certificate, and under the 3rd section of the statute 19 Vict. c. 9. By that clause, when the commissioners shall be satisfied, by the report of a commissioner, assistant commissioner, surveyor, or engineer, or otherwise, that the works referred to in the provisional certificate, or part, have been duly executed, and shall also be satisfied that such expense has been incurred as will justify the advance, the commissioners shall forward a certificate of advance under their seal, and accompanied with their recommendation, to the Treasury, for an advance. The certificate shall specify the land in respect of which the advance is to be made, and shall certify that the sum therein mentioned should be issued to the person therein named in respect of the drainage of such land.

Then, by sect. 4, the Commissioners of the Treasury, upon the application of the commissioners, may direct the Comptroller of the Exchequer to give the necessary issue (whether by a credit on the growing produce of the Consolidated Fund, or by exchequer bills), to enable them to make the proposed advances. Upon receipt, the Comptroller-General is to give credit to the commissioners, or place exchequer bills to their account, for the amount specified in such direction from the Treasury. The commissioners shall then, upon such credits or produce of the sale of such bills, give warrants or orders under their seal to the Governor and Company of the Bank of England or Ireland, to pay from the "Drainage Advances and Repayment Account" to the respective parties named in such warrant or orders the sums specified therein.

In Scotland, by sect. 5, the commissioners must deliver the certificate of advance to the owner, and he shall have it registered in the general or particular register of sesines, and return it, indorsed by the keeper of the register, to the commissioners.

In Ireland, a memorial is to be registered, and the duplicate certificate transmitted by the registrar of deeds, and the owner

respectively, to the commissioners, who are to transmit them to the Treasury (q).

Repayment
of expenses
and ad-
vances.

Having now mentioned how the advances for drainage are to be obtained, together with the preliminary investigation required upon applying for the grant, we proceed to set out the various clauses which provide for the repayment of the monies thus expended by the Government.

And first, with regard to the investigation necessary previous to and pending the continuance of the provisional certificate (r), the stat. 9 & 10 Vict. c. 101, s. 46, provides, that the commissioners, having regard to the time, labour and expenses of the commissioner, assistant commissioner, surveyor, or engineer, or other person, employed about the preliminary investigation, or, in the case of a provisional certificate, about the inspection of the works, may by order under seal direct that a sum shall be paid by the owner of the land to the commissioners in respect of such time, &c., or by his heirs, executors, or administrators, according to the terms of the order, and such sum shall be a debt payable to the commissioners. The sum thus received is to be paid into the Exchequer as part of the Consolidated Fund. Provided, that where the commissioners have directed that all or a part of these expenses shall be included in the expenses in respect of which the loan and the advances on account thereof shall be made, the commissioners may retain such sum, or such part thereof as is expressed in the certificate, out of the money to be advanced by them to the land owner under the authority of the act.

Then, with respect to the repayment of the loan and advances, the stat. 8 & 9 Vict. c. 56, s. 9 (which we may now consider to be superseded), directed that the principal should be repaid by equal annual instalments. Such instalments, in the case of improvements by drainage, warping, irrigation, or embankment, were to be not less than twelve, nor more than eighteen, in number; and in the case of improvement by the erection of

(q) 9 & 10 Vict. c. 101, s. 31.

(r) Under 9 & 10 Vict. c. 101, s. 16.

buildings, not less than fifteen, nor more than twenty-five, in number.

By 8 & 9 Vict. c. 56, s. 10, it was enacted, that any person on whose petition the charge on the estate should be made, and every succeeding tenant for life, or other person having only a limited interest in the land charged, should pay the interest and instalments due from time to time during the continuance of his title, and that on the termination of his title, by death or otherwise, the inheritance should remain chargeable with no more than six months' arrear of interest then due, and one-half of the last instalment then due, and the interest and instalments thereafter to become due.

But the more material statute upon this subject is the 9 & 10 Vict. c. 101, whose provisions we now revert to again, remembering that the mode of repaying the loans and advances under it is now to be set forth.

Thus, by 9 & 10 Vict. c. 101, s. 34, the charge upon the land is to be 6*l.* 10*s.* per cent., and so in proportion for any lesser amount, and to be payable for twenty-two years, to be computed from the 6th of April or 10th of October which shall next happen after the issue of such advance. The rent-charge is to be paid by equal payments on the 6th of April and 10th of October, the first payment to be made on the second of such days next after the issue of the advance. Then follows the method of recovering it. In England, it shall be recoverable by the Commissioners of Stamps and Taxes, in like manner as a rent-charge is recoverable under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, *i. e.* by distress, &c.(s).

In Ireland, the same is recoverable as a rent-charge in lieu of tithe would be under the statute 1 & 2 Vict. c. 109, and the several acts passed for amending the same. Still, whether in England or Ireland, these charges shall not take priority before tithe rent-charges, nor before any quit rent or chief rent incident to tenure, but before all other charges on the same land. In

(s) See 6 & 7 Will. 4, c. 71, s. 81, &c.

Scotland, the charge shall be recoverable like any fen duty or rent, or annual rent, or other rent payable to her Majesty, and shall have priority over all charges except fen duty. But should no proceedings be taken for three years to recover such rent-charge when due, such preference as aforesaid shall not take place (*t*).

Collection.

The collection of the rent-charge is settled thus. In Great Britain, the collectors of the land-tax and assessed taxes are to be the collectors of the charge, under the directions of the Commissioners of Stamps and Taxes, who shall have the management of the monies, and make allowance to the collectors as the Treasury may direct. The monies are to be notified to the Commissioners of Stamps and Taxes and paid to their Receiver-General, who shall keep a separate account, and, after paying the expenses of collection, shall pay the balance into the Bank, to the account of "Drainage Advances and Repayments," and the Bank shall transfer such monies to such account accordingly, in order that the same may form part of the Consolidated Fund (*u*).

In Ireland, the collectors of excise shall collect the charge in the same manner as quit and Crown rents, and the money shall be paid into the Bank of Ireland, to the credit of the Paymaster of Civil Services (*x*).

The following sections deal with any objections which might be made to the title or legal condition of the land so charged in respect of trusts, mortgages, or incidents of tenure. Thus, in Scotland, no proprietor of an entailed estate availing himself of the provisions of the act shall be deemed to have contravened the conditions of entail, and so be liable to be evicted (*y*).

And this rent-charge shall not be deemed such an incumbrance as shall preclude a trustee of money held in trust to be invested in the purchase of land, or to be invested on mortgage,

(*t*) 9 & 10 Vict. c. 101, s. 35.

(*u*) Sect. 42.

(*x*) Sect. 43.

(*y*) Sect. 36.

from investing such money in a purchase or upon a mortgage of land subject to a rent-charge, unless there be a prohibition in the trust deed that the land so to be purchased or taken in mortgage shall not be subject to any rent-charge under the act (z). Then, by sect. 38, every owner of land, on whose application a rent-charge shall have been thus created, and every succeeding heir of entail, tenant for life, or life renter, or other person having a limited interest in the land charged, shall, as between such person and the persons in remainder or reversion, be bound to pay over the half-yearly payment of the rent-charge due during the continuance of his interest, and, in case he shall be in the actual occupation of or entitled to an apportioned part of the rents and profits of such land up to the time of the termination of his interest, shall also be bound to pay an apportioned part of the half-yearly payment of such rent-charge which shall become due next after the termination of his interest, proportioned to the time which shall have elapsed between the day of the previous half-yearly payment, and the day of such termination.

With reference to the apportionment, it is enacted, by sect. 44, that if it shall be represented to the commissioners, that the land charged is in separate farms, or shall have become the property of separate owners, or that there are separate titles in the same owner, or distinct and separate interests, or that the owner is desirous to sell part of the land, or that an apportionment is on any other account desirable, the commissioners, with the consent of the owner or owners, may, by order under their seal, apportion the rent-charge, so that a separate and distinct rent-charge may become charged on each separate farm, or on the land of each owner, or on the land held under each separate title, or for each distinct and separate interest, or on the part or each part which the owner is desirous to sell, and the part intended to be retained by him, or on other separate parts of the said lands, but so that no rent-charge charged under such apportionment shall be less than twenty shillings. Every such order of apportionment shall be transmitted by the commissioners to the commissioners of stamps and taxes, or col-

Apportionment.

(z) Sect. 37.

lectors of excise respectively, and they shall collect the apportionment instead of the original rent-charge, in like manner as if there had been a separate rent-charge in the first instance. Where a part only of the land charged under the Lands Improvement Companies Acts, 1853 and 1855, is subject to a mortgage or other incumbrance, the charge under these acts has priority in respect of the *whole* amount of such charge over the mortgage or other incumbrance until apportionment be made by the inclosure commissioners under the 70th section of the Act of 1853. So that the person entitled to such charge may exercise his remedies under these acts as if no such mortgage or incumbrance existed (*a*).

Redemption
of rent-
charge.

By sect. 45, the owner of land charged may, at any time before the end of twenty years after the charge, redeem the same or any part, not being less than 10*l.* annual charge, on payment, however, of all arrears to the Commissioners of Stamps and Taxes in Great Britain, or to the Paymaster of Civil Services in Ireland, respectively, and likewise on payment of such sum as shall be equal to the aggregate amount of the half-yearly payments not then accrued due, after deducting or allowing discount at 3*l.* 10*s.* per cent. in respect of such several future payments. The commissioners shall then deliver to the owner a certificate of redemption (which is free from stamp duty), (sect. 47), and they shall pay over all such monies to their Receiver-General, who shall deal with such monies as in the case of monies received by him for rent-charges (*b*). The Treasury also shall cause tables to be framed showing the rate at which the rent-charges may be so redeemed in the several years during which they are made redeemable, and may make regulations limiting the times of the year in which they may be redeemed.

Tenant
occupier.

As yet nothing has been said concerning an occupying tenant: his rights, liabilities, and duties, have not yet been entered upon. First, under the 8 & 9 Vict. c. 56, his assent was deemed necessary before lands held by him could be improved. Thus,

(*a*) *Lands Improvement Company v. Richmond*, 17 C. B. 145; 25 L. J., C. P. 73.

(*b*) See sect. 42.

by sect. 13 of the act, the consent in writing of the actual occupier was required in order to give validity to the application of the proprietor of the land to be drained.

By 9 & 10 Vict. c. 101, s. 40, if any tenant or occupier at a rent in Great Britain shall join in the application for an advance under the act, or shall, by writing, signify to the commissioners, &c., his consent to become charged with the rent-charge, or apportionment, he shall be liable to the payment of the same. And if the application shall relate to other land as well as the land included in the tenancy, the commissioners may, with the consent of such tenant, apportion the charge either in their provisional certificate, or by a separate order of apportionment. Except as aforesaid, the tenant may deduct the rent-charge from the rent, and shall be allowed the same in account. In Ireland, if there be a landlord having intermediate estates or interests between the tenant or occupier and the owner, then such tenant may deduct the amount from the rent payable to his next intermediate landlord. And the last-mentioned landlord, unless he should have joined in the application for the advance, or have consented to be charged, may deduct from the rent due to his next intermediate landlord, and so on, until the amount shall be deducted from the owner of the land, or from some landlord who shall have joined in the application, or who shall have signified his consent as aforesaid. The 41st section settles the arrangement which the commissioners may make when tenants in Ireland are desirous to concur in an application for an advance, or to become charged with the rent-charge.

Then, lastly, as to repair, by 8 & 9 Vict. c. 56, s. 11, every ^{Repair.} tenant for life, or other person having a limited interest, shall be bound to keep in repair any buildings, or embankments, or works for irrigation, constructed under the act, as if he were tenant for life subject to impeachment for waste.

And by 9 & 10 Vict. c. 101, s. 39, so long as any land shall continue charged with any rent-charge under the act, the person for the time being who is bound to the payment of the half-yearly payments thereof shall be bound to uphold the drains on account of which the lands shall have been charged, and to

keep clear and open the outfalls of all such drains, and once in every year shall certify to the commissioners the state of the drains and outfalls: and, in default of so doing, shall be liable to an action on the case in the nature of an action of waste for the damage occasioned, at the suit of the person then entitled to the next estate in remainder or reversion in the said lands, rendering him liable to the payment of such rent-charge on the determination of the estate in possession.

Thus far concerning the advances of money to drain the lands of those owners who have made application to Government for aid. But it will be observed, that the statutes already set forth have little connection with the lands of others. Still less do they enable persons who may be anxious to carry out improvements to meddle for that purpose with the lands of others. It has, however, been deemed expedient by the Legislature to empower the owners of property, under certain conditions and restrictions, to enter upon lands not their own, in order that improvements in drainage, which cannot be effected upon their own demesnes unless they interfere with those belonging to strangers, may be effected.

The stat. 10 & 11 Vict. c. 38, was passed to facilitate this object, and it may be read conjointly with the other acts relating to drainage. By sect. 4,* where any land shall be capable of being drained or improved by drainage or warping, by means of works to be executed on the same and other lands, for obtaining

* The Interpretation Clause (sect. 20) of this Act is as follows (except where the nature of the provision or the contract is repugnant to such construction):—

"*Agent.*" Any person employed to receive rents.

"*Churchwarden.*" Also any chapelwarden or other officer executing any similar duties.

"*Commissioner.*" The Inclosure Commissioners for England and Wales.

"*Justice.*" Justice of the peace acting for the county, riding, city, division, liberty, or other place where the matter requiring the cognizance of any such justice shall arise, and who shall not be interested in the matter.

"*Justices.*" "*Two Justices.*" Two or more justices assembled and acting together in petty sessions.

"*Masculine Gender.*" shall apply to a female as well as a male.

"*Parish.*" Also any township or other division or extra-parochial place.

"*Person.*" See "*Proprietor.*"

"*Persons interested in the Land.*" Such persons as would be deemed to be so interested under 8 & 9 Vict. c. 118.

and improving the outfall or otherwise, any person interested (*c*) in the land so capable of drainage, but who is not able to execute the desired works, by reason of the objection or disability of any person whose land would be entered upon, cut through, or interfered with by such works, may apply to the commissioners by memorial. This memorial must show the means by which it is proposed to effect the improvements, and must pray the authority of the act in aid of the same. To this must be annexed a map or plan showing, first, the land to be improved; and, secondly, the land to be entered upon, &c., or likely to be affected: and also the rivers, watercourses, ditches, and drains intended to be cleared, scoured, deepened, or embanked, and the proposed variations, diversions, abridgments or enlargements of the same, and the new cuts, embankments, drains, watercourses, and other works proposed to be made, and the engines and machinery proposed to be erected for the purposes aforesaid.

Schedules must likewise be produced, showing the reputed proprietors, lessees, and occupiers of the lands in question, and the lands and property to be entered upon, &c.; and also an estimate of the proposed works, engines, &c., including the probable amount of money payable as purchase and compensation money in respect of the land to be entered upon, &c. Likewise a statement of the actual condition of the land to be drained, and of the probable increased value thereof by reason of the works (*d*).

Still, if a judgment can be formed by the commissioners without such map, plan, and estimates, including the whole of

“*Plan.*” Also drawings and sections.

“*Plural Number*” shall extend to one person or thing as well as several persons or things.

“*Proprietor.*” The Queen’s Majesty; all bodies politic, corporate, and collegiate; all bishops, parsons, and other ecclesiastical persons.

“*River.*” Also all rivulets, lakes, canals, streams, and estuaries.

“*Singular Number*” shall extend to several persons or things as well as to one person or thing.

By sect. 21, the act might be amended or repealed during that session of Parliament.

(*c*) In enclosure, the valuer is to be deemed the person interested, 15 & 16 Vict. c. 79, s. 2.

(*d*) Sect. 4, *ubi supra*.

the land to which such memorial shall relate, then a map or plan showing only the proposed works, or such other map or plan as the commissioners shall think necessary, need be produced. Moreover, the memorial, or some schedule thereto, shall show the persons by whom the works are proposed to be executed, and the persons by whom such application shall be made shall, upon the request of the commissioners, furnish such further details in respect of the said map, &c., as the commissioners may think fit. Copies of the memorial, map, &c., are to be deposited by the person applying in a convenient place at hand, and approved by the commissioners, for public inspection during one month. And the deposit thereof shall be certified to the commissioners, and all persons may inspect and make copies or extracts from the same, and copies may likewise be made by the commissioners' direction for any person requiring the same, upon payment of the costs of making them (e).

Then, by sect. 5, the commissioners shall require notice to be given by advertisement twice in one or more newspapers circulated in the county where the works are to be executed of the memorial having been presented, of the parishes where the works are to be made, and of the places where copies of such memorial, map, &c., are deposited. A like notice is to be served on all persons not parties to the application, whose lands are to be entered upon, &c. The service may be personally on the lessee or occupier, or by leaving it at his usual or last known place of abode. Again, a like notice is to be served on the proprietor, or reputed proprietor, of such land, or his agent, either personally or by leaving the same at his usual or last known place of abode.

By such notice, all parties interested, or in anywise affected by the proposed works shall be required, on or before a day to be therein named, not sooner however than six weeks from such publication and service of the notice, to transmit in writing to the commissioners all objections which they may entertain to the proceedings contemplated by the memorial.

(e) Sect. 4, *ubi supra*.

The 6th section provides that provision or security be given for the costs incident to the application, by the parties applying, *i. e.* the costs occasioned by the inquiries and proceedings in relation thereto. This section is confined to the commissioners' costs. It does not include the costs of persons opposing the application (*f*).

By sect. 7, where objections are transmitted to the commissioners, an assistant commissioner is to be appointed to inspect the lands proposed to be drained or improved, as well as the lands intended to be entered upon, cut through, interfered with, or affected. The commissioners shall then, if they think fit, call one or more public meetings, with twenty-one days' notice at the least to the persons so objecting, and by advertisement in one or more newspapers circulated in the county where the works are to be made. The meeting is to include all persons likely to be affected by the works, and it is to be held on such day or days subsequent to the expiration of the above period of six weeks (*g*), and at such convenient place or places within the parish, or one of the parishes wherein the land so to be drained or improved shall be situate, or in the vicinity thereof, as the commissioners shall specify in such notice, and the assistant commissioner shall attend at the time and place named, and shall have power to adjourn any meeting from time to time, or hold any new meeting as he may find necessary, and he shall inquire into the correctness of the schedules containing the names of such reputed proprietors, lessees, and occupiers as aforesaid (*h*), and also whether the notices have been duly given and served, and likewise hear and inquire into all objections before another made, and receive evidence offered in relation to the matters at issue.

By sect. 8, the assistant commissioner is to report his opinion upon the matters, and upon the objections, with the evidence taken at the meetings (if any such shall be held), or otherwise, to the commissioners. The commissioners shall then consider the proposed drainage or improvement, and such objections;

(*f*) *Re Inclosure Commissioners*, 33 L. J., M. C. 171.

(*g*) See sect. 5.

(*h*) See sect. 4.

and they make further inquiries, and take further evidence if they shall see fit; and if they shall be of opinion that the works may be done without material detriment to the lands proposed to be cut through, &c., or that the damage may be well compensated under the provisions of the act, they may allow such works according to the proposal in the memorial, or with such alterations as they may think fit. And, by an order under their seal, they may authorize the persons applying, or any of them, or any other person to be named or described by them in such order, to execute the works as the same shall have been allowed, within a time to be limited in the order. And such order, or some plan thereunto annexed, shall specify the works to be done, and the persons authorized by such or by any supplementary order of the commissioners shall have full power to execute the works according to the order, and to maintain them for ever thereafter, subject, nevertheless, to the provisions subsequently contained in the act, and to the compensation to be ascertained under the act in favour of persons damaged by the execution of the powers granted by such order.

The power being given to execute the works, the 9th section authorizes the entry upon lands in order to carry out the act. Any land in the order of the commissioners, or in the plan thereunto annexed, may thus be entered upon; and, in conformity with the terms of the order, but not otherwise, any river, stream, ditch, or drain, brook, pool, or watercourse may be widened, straightened, deepened, diverted, scoured, or cleansed. And any new watercourse, side cut, ditch, or drain, may be made, opened, and cut; and any bank, sluice, floodgate, clough, hatch, weir, dam, or other obstruction may be altered or removed; and any bank, sluice, floodgate, hatch, ditch, drain, tunnel, or other works necessary or convenient for drainage or for warping may be made or erected; and any river or watercourse may be dammed, barred, and stopped up with any weir or dam, and such persons so authorized as aforesaid may erect and maintain on such land steam and other engines and machinery. But no such entry shall be made, except with the consent of the proprietors of the same, till the amount of compensation for damage occasioned by the entry, and by the execution and maintenance of the works, shall have

been agreed upon and ascertained, as the case may be, and paid under the provisions of the act.

However, by sect. 12, the streams, reservoirs, or feeders of ornamental waters are expressly saved to their owners, unless such owners shall consent or agree that the same may be meddled with.

The mode of providing sites for engine-houses, and the compensation above alluded to, are settled by the 10th and 11th sections. By the 10th section, the commissioners may, by any such order as aforesaid, authorize any person therein mentioned to purchase and take as the site of any engine-house, or for any other purpose necessary for the works thereby authorized, any land not being in any park or pleasure ground in such order to be described. Yet, otherwise than by agreement, not more than three acres may be so taken. The clause goes on to award the powers of "The Lands Clauses Consolidation Act, 1845," as far as those powers apply to the purchase of land otherwise than by agreement (*h*), and provided no more than the three acres specified in the order be taken. And if there be an agreement, then the same powers of that Act of 1845 (*i*) are still applicable to land authorized to be purchased by the order, except as aforesaid, *i. e.* excepting the purchase of any park or pleasure ground; and all lands purchased or taken as above shall be conveyed to and held by such persons, and upon such trusts, as the commissioners shall, by such order, direct.

Next, with reference to the compensation, the same powers of the Lands Clauses Act, which are thereby given in the case of lands purchased otherwise than by agreement (*h*), are by sect. 11 of this act (10 & 11 Vict. c. 38) made applicable to such compensation. The persons who are authorized to execute the works shall for the purposes of the Lands Clauses Act, and this act, be deemed the "promoters of the undertaking" (*l*),

(*h*) See 8 & 9 Vict. c. 18 (The Lands Clauses Consolidation Act), sect. 16, &c.

(*i*) See 8 & 9 Vict. c. 18, s. 6, &c.

(*k*) 8 & 9 Vict. c. 18, s. 16, &c.

(*l*) "Promoters," &c., see 8 & 9 Vict. c. 18, ss. 6 and 16.

and the other clauses of the above Act of 1845 shall be incorporated with this act, and shall apply thereto, and to the works and purchases to be authorized by the commissioners, as though the works and purchases which shall be authorized by the commissioners had been set forth and authorized to be executed and made by this act.

The 13th section speaks of a depositary for the orders of commissioners. Two copies of every order for the execution of works shall be made, and sealed with the seal of the commissioners. One shall be deposited with the clerk of the peace of the county where the land authorized to be drained, or the greater part thereof, shall be situate, and the other with the church or chapelwardens for the time being of the parish where such land, or the greater part, is situate, to be left by them and their successors in office with the public books, writings, and papers of the parish—or such second copy shall be deposited with such other fit persons as the commissioners may approve. The clerk of the peace is to keep his copy among the records of the county, so that recourse may be had thereto by any person interested in the premises; and all persons interested may have access to, and be furnished with copies of or extracts from any such copy, on giving reasonable notice to the party having custody of the same, and on payment of 2s. 6d. for such inspection, and after the rate of 3d. for every seventy-two words contained therein; and all such copies, &c., furnished by the clerk of the peace shall be signed by him or his deputy, purporting the same to be a true copy or extract, and every such copy so signed shall be received as evidence without further proof.

We have now finished the main subject of drainage. The residue of the act, as yet unnoticed, relates to the novel remedy of enabling occupiers to scour neighbouring channels upon other lands. The preamble of the 14th section explains the difficulty, and proposes a remedy. “Whereas by reason of the neglect or want of co-operation among the occupiers of lands to maintain the banks and clean and scour the channels of existing drains, streams, and watercourses, lying in or forming the boundaries of such lands, and being or leading to the outfall from such lands, and from other lands, much injury is occasioned

and improvement prevented, but sufficient powers do not at present exist to remedy the evil aforesaid :” it is therefore enacted, That in all cases where by the neglect of such occupier to maintain or join in maintaining the banks, or to cleanse and scour, or join in cleansing and scouring the channels of existing drains, streams, or watercourses lying in or bounding the lands of such occupier, injury shall be caused to any other land, the proprietor or occupier of any other land so injured may require the proprietor or occupier so neglecting, by a notice in writing, delivered to him, or left at his usual place of abode, effectually to maintain such banks, or cleanse or scour such channels of such drains, streams, and watercourses, or effectually to join in the same. Then, in case of neglect, the occupier of the land receiving injury may immediately after the expiration of one calendar month from the period of such notice, execute or cause, &c., or may join with any other person in executing, &c., all necessary works for maintaining or repairing such banks, or cleansing or scouring such channels: and in case the expenses paid or incurred in such works, or the just proportion thereof, which should have been paid or borne by the occupier so neglecting as aforesaid, shall not be paid to the person by whom the same shall have been paid or incurred by the occupier so neglecting, within one calendar month after demand, any justice may, upon application by the person who has paid the money, summon the defaulter to appear before two justices, at a time and place therein mentioned. Upon his appearance, or in his absence upon due proof of the serving of the summons, such two justices, upon proof likewise of the neglect and injury, and of the expenses incurred, may make an order for payment upon the occupier so making default, or of such just proportion as the justices may think he ought to pay, and they may award costs to be paid in such manner as they may think reasonable, and the amount both of the expenses and costs may be recovered by distress. This warrant of distress shall accordingly be issued, and distress and sale made of the defaulter’s goods, and the surplus returned, on demand, to such defaulter after satisfying the sum distrained for, and the expenses of the distress and sale (*m*). And no such distress is to be deemed unlawful, nor

(*m*) 10 & 11 Vict. c. 38, s. 16.

any party to be deemed a trespasser on account of any defect or want of form in the summons, adjudication, warrant of distress, or other proceeding relating thereto, nor shall any party be deemed a trespasser *ab initio* on account of any irregularity afterwards committed by him; but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in an action upon the case (*n*).

The 15th section imposes in certain cases a guard upon the entry of occupiers by requiring a warrant of justices for such their entry. Thus, unless the drain, stream, or watercourse, shall be a boundary of or immediately adjoining to the land of the occupier whose land shall have been injured by such neglect as aforesaid, the occupier so injured may not enter to execute his works without a warrant or authority in writing from two justices, which warrant, &c., they shall grant upon inquiry made before them, after a summons served upon the occupier of the land to be entered upon, *i. e.* if they shall be satisfied of his neglect and of the consequent injury. However, the justices may adjourn the hearing or further hearing of any application for any order, or for any warrant or authority under the act, to a subsequent day, and may appoint a competent person to view in the meantime the drain, stream, or watercourse, and to report thereon to the justices on the day to which such hearing shall have been adjourned; or the said justices, or any of them, may in the meantime attend and view the said drain, &c.

The saving clauses (sects. 18 and 19) relate to the commissioners of sewers and to the Board of Admiralty. By the 18th, nothing shall affect the rights, duties, privileges, &c. of the commissioners of sewers, or commissioners appointed under any local sewers or drainage act, or shall affect the laws of Romney Marsh or of the Bedford Level. Nevertheless, if the persons interested in any lands to be drained under such a local or private act, or if any portion, not being less than two-thirds in number and value of them, shall be desirous of having their lands drained under this act, and shall notify such their desire

(*n*) 10 & 11 Vict. c. 38, s. 17.

in writing to the commissioners under this act, the commissioners and assistant commissioners may then exercise all the powers of this act in like manner as if the local act were repealed.

Otherwise, no local act can be interfered with. Where a surveyor, notwithstanding the provisions of a local act, which forbade persons from arching over any ditch, &c. without the consent of the trustees under the act, persisted in continuing a sewer, he was held liable to the penalty of 50*l.*, prescribed by the statute in an action of debt. It was urged for the surveyor, that the sewer had been begun before he took any part in it, that he was, in fact, the servant of those for whom the work was done, and that the mere direction to proceed could not render him liable to the penalty. But the Court did not entertain a doubt of his liability, and the rule for entering a nonsuit was discharged (*o*).

Then, by sect. 19, no person acting or pretending to act under this act may make or construct, alter or extend, on the shore of the sea, or of any creek, bay, or arm of the sea, or any navigable river communicating therewith, where and so far up as the tide flows, any work which might not have been lawfully made in case this act had not been passed, without the consent of the Lord High Admiral, or of the Lords of the Admiralty, to be signified in writing under the hand of the secretary of the Admiralty; and then only according to the plan, restrictions, and regulations approved of by such Lord High Admiral, &c., such approval being signified as last aforesaid. If any such work shall be commenced or completed contrary to the act, the Lord High Admiral, &c. may abate and remove the same, and restore the site to its former condition, at the cost of the persons or of any one or more of the persons by whom the same shall have been commenced and completed. Moreover, nothing contained in the act shall authorize any person acting or pretending, &c., to make any work injurious to the navigation of any navigable river, or land, or to use or occupy land between high and low

(*o*) *Woodward v. Cotton*, 1 Cr., M. & R. 44, *ante*, p. 245.

water mark, without the consent of her Majesty's Commissioners of Woods and Forests.*

Another act upon this subject was passed in 1849 (*p*), and another in 1850, both to be construed with 9 & 10 Vict. c. 101 (*q*). Upon a question whether bricks used for drainage were liable to the duties of excise, Parke, Alderson and Rolfe, Barons, held that bricks used *for all purposes* necessary, physically or legally, for maintaining drainage were exciseable. Pollock, C. B., was of opinion that bricks physically necessary to the construction of drains were exempt, not otherwise (*r*).

Electoral
boards of
drainage.

We will in this place briefly refer to the electoral drainage boards under 24 & 25 Vict. c. 133.

The 63rd section provides for their constitution, and sect. 64 arranges the mode of creating the district. Sect. 65 makes the provisional order conclusive evidence that the requirements of the act have been complied with.

The drainage board and its powers and regulations are ordained by the ensuing sections (*s*). The Commissioners Clauses Act (10 & 11 Vict. c. 16) is incorporated by sect. 71.

The same statute 24 & 25 Vict. c. 133, gives power to private owners to procure outfalls from adjoining owners. Thus, by sect. 72, any person interested in land, and desirous of draining it with a new drain through other lands, or that existing drains belonging to other lands should be cleansed, widened, &c., may apply to the owner of the other lands, called the adjoining owner, for leave to make the improvement. By sect. 73, the application shall be by notice in writing under the hand of the applicant, and served upon the owner, or the occupier, if the

* With reference to draining ditches, &c., under the Highway Act, see 5 & 6 Will. 4, c. 50, ss. 67, 68; under the Inclosure Acts, see 41 Geo. 3, c. 109, s. 10; 6 & 7 Will. 4, c. 115, ss. 38, 39; 8 & 9 Vict. c. 118, s. 61. These acts are interfered with and some of their provisions repealed, and others substituted by 19 Vict. c. 9.

(*p*) 12 & 13 Vict. c. 100.

(*q*) 13 & 14 Vict. c. 31.

(*r*) Attorney-General *v.* Walker, 3 Ex. 292; 18 L. J., Ex. 179.

(*s*) Sects. 66—70, and see the Schedules.

owner do not occupy (*t*). The nature of the drains and improvements must be stated, with a map, and the compensation which the applicant is willing to pay. Then, by sect. 74, the adjoining owner may by deed, under his hand and seal, assent upon such terms and compensation as he may think fit, and such assent shall bind all parties, subject, nevertheless, to these rules. 1. If the adjoining owner be under any disability or incapacity, or have no power to assent, except under the act, two surveyors, one to be named by the applicant, the other by the adjoining owner, must sign a declaration of their approval, and annex it to the document. 2. The compensation shall, in such a case, be applied as under the Lands Clauses Act, in the case of persons having limited interests, &c. 3. The occupier, not being owner, may claim compensation for damage, but within twelve months after the completion of the drains or improvements, and if any dispute arise concerning the compensation, the Lands Clauses Act shall be called in aid. By sect. 75, the applicant shall forward the deed to the clerk of the peace, to be by him kept as a record (*u*). But the adjoining owner may dissent, this he shall be deemed to have done if he do not express his assent within one month after service of notice. In that case, unless the adjoining owner require an arbitration within the month, two justices in petty sessions shall decide. 1. Whether the improvements will cause any injury to the adjoining owner, the occupier, or other person interested. 2. Whether such injury can be compensated by money. The provisions of the first part of the act shall apply (*x*). If the first question be answered in the negative, the drains, &c., may be made. If the justices find for a compensation, they may assess and apportion it, and, upon payment, the applicant may then proceed. If both questions should be answered in the negative, the applicant shall not be entitled to make the improvements. . . . The 77th section deals with the payment of compensation awarded by justices or arbitrators to persons under disability, and adopts the Lands Clauses Act as the rule in such a case (*y*). However, the

(*t*) After the manner ordained in Part I. of the Acts.

(*u*) Sect. 76.

(*x*) Sect. 18.

(*y*) See *ante*, sect. 74.

justices or arbitrators will take care to approve the scheme of drainage, either as proposed or as modified by themselves. They must also have a map prepared, and certify its correctness. The map must then be sent to the clerk of the peace as a record (*x*). The drains so being made, power is given by sect. 79 to the applicant, his heirs and assigns, to enter upon the adjoining lands to clear out and maintain the drains. If that be neglected, the owner or occupier of such adjoining lands may do the work and recover the expenses in a summary manner from the applicant, his heirs or assigns. Yet, the adjoining owner may fill up, divert or deal with these drains, provided that he make others as efficient, and any dispute as to the efficiency shall be settled in petty sessions (*y*). A penalty not exceeding 10*l.*, to be recovered in a summary manner, is awarded against any person obstructing another in making the drains, &c., or damming up or obstructing, or in any way injuring them (*z*). All reasonable costs and expenses incurred by the adjoining owner shall be defrayed by the applicant (*a*).

Lastly, by sect. 83, where any person is desirous of constructing under this act any drain by means of which any brook, river or other natural watercourse will be diverted from its ordinary channel into any other brook, &c., he may cause a copy of the notice hereby required to be served on the adjoining owner to be advertised for three successive weeks and to be served as under Part I. of the act (where no special mode of service is prescribed) on all owners of land abutting upon the brooks, &c., into which the diversion is made and situate within four miles of the point of junction. Also he shall deposit a copy of the map hereby required to accompany the notice served with the clerk of the peace of the county, &c., where the drain is situate. Then if any owner of land capable of being injured by the proposed drain, shall within eight weeks after the first notice in the newspaper, serve notice on the person proposing to make the drain that he apprehends injury, such owner shall be deemed to have dissented, and shall be entitled to the same rights under this part of the act, as if he were the adjoining owner.

(*x*) Sect. 78.(*y*) Sect. 80.(*z*) Sect. 81.(*a*) Sect. 82. See Re Inclosure Commissioners, App. p. 231.

Lastly, we must call attention to the "Towns' Improvement Clauses Act, 1847," by which name the act is legislatively known (*e*). However, the provisions of this statute are in a great measure rendered unnecessary by the Health of Towns' Acts, and, therefore, we must refer very briefly to those parts of the "Towns' Improvement Act" which relate to sewerage and drainage. This statute is declared to be incorporated in any act to be passed after the 21st of June, 1847, which shall declare that it shall be so incorporated, and its object is to comprise in one act the provisions usually ordained for paving, draining, cleansing, lighting and improving towns and populous districts (*f*).

By sect. 7, a local surveyor of drainage is to be appointed, with a salary subject to approval, as therein mentioned. The local commissioners may fill up any vacancy, or remove this surveyor (*g*).

The 8th section prescribes a form of declaration by the surveyor.

The 9th section enables the local commissioners to appoint an "Inspector of Nuisances" (*h*), with powers to promote cleanliness and suppress nuisances.

By sect. 10, the surveyor and inspector may be the same person (*i*).

By sect. 12, the commissioners may appoint, subject to the approval of a secretary of state, an officer of health. His duty is to ascertain the existence of diseases, especially contagious diseases, and to provide means for checking them; he is likewise to attend to the ventilation of churches and other public buildings, and lodging-houses, and is to be entirely under the control of the commissioners (*k*).

(*e*) 10 & 11 Vict. c. 34, s. 4.

(*f*) *Id.* s. 1.

(*g*) See 11 & 12 Vict. c. 63, s. 37 (Health of Towns' Act).

(*h*) See *Ibid.*

(*i*) See *Ibid.*

(*k*) *Id.* s. 40.

The 13th and following sections (*l*) relate to the making of surveys and maps, which, amongst other things, are to contain the "existing sewers and drains."

The 17th and 18th sections speak of plans for any new works, especially relating to sewers and outfalls.

The next class of sections (*m*) has reference to the taking of lands; and the Lands Clauses Consolidation Act (*n*) is to be adopted as a guide in carrying out that object.

The management of sewerage and drainage is next provided for. The sewers are to be vested in the local commissioners, and the drainage to be distributed into districts (*o*).

The 35th and ensuing clauses provide for house drains (*p*).

Objections to new sewers, and proceedings thereupon, are dealt with by the 84th and subsequent sections of this act (*q*).

Nuisances through stagnant water are provided against by the 99th and other sections of the same statute.

The 132nd and 133rd sections relate to special orders under the act.

The power to enter into lands is given by the 144th and subsequent sections (*r*).

The next class of clauses deals with the subject of rates,—private improvement rates; sewers' rates; drainage rates;—together with the mode of assessing and recovering them (*s*).

(*l*) See sects. 13—16 inclusive, and 11 & 12 Vict. c. 63, ss. 41, 42.

(*m*) Sects. 19, 20, 21.

(*n*) 9 & 10 Vict. c. 18.

(*o*) See the sections, 10 & 11 Vict. c. 34, s. 22—34 inclusive, and 11 & 12 Vict. c. 63, s. 43 (The Health of Towns' Act).

(*p*) 10 & 11 Vict. c. 34, s. 35—37 inclusive, and 42—46 inclusive. See 11 & 12 Vict. c. 63, s. 49, &c.

(*q*) 10 & 11 Vict. c. 34.

(*r*) That is to say, under 10 & 11 Vict. c. 34, s. 144—153 inclusive. See 11 & 12 Vict. c. 63, s. 143.

(*s*) 10 & 11 Vict. c. 34, s. 156—199 inclusive. See 11 & 12 Vict. c. 63.

Next come the sections relating to the making of bye-laws (*t*). And the few remaining clauses have reference to procedure, and to other matters incident to the working of the act (*u*).

By 19 & 20 Vict. c. 120, s. 14, the Courts of Chancery in England and Ireland may ordain, that parts of settled estates may be laid out, (*inter alia*,) for sewers, drains or watercourses, either to be dedicated to the public or not.

(*t*) 10 & 11 Vict. c. 34, s. 200—208 inclusive. See 11 & 12 Vict. c. 63, ss. 34, 115, 116.

(*u*) 10 & 11 Vict. c. 34, s. 208—216 inclusive. The Waterworks' Clauses Consolidation Act, 10 & 11 Vict. c. 47, may also be referred to.

PRECEDENTS OF ORDERS OF SEWERS.

FORMS AND PLEADINGS.



THESE PRECEDENTS ARE TAKEN FROM THE APPENDIX TO CALLIS ON
SEWERS.

I.

An Order to repair a Wall or Bank.

WHEREAS the wall or sea-bank called, &c., leading from and to, &c., is by means of the great violence of the sea of late become very ruinous, defective, and out of repair, and not fit to resist the rage of the waters, but oftentimes letting in the same on the marsh and low grounds and lands thereto adjoining, in the parish of, &c. aforesaid, to the very great detriment and loss of all and every the owners thereof, in the grass there grown and cattle therein depastured, which are frequently destroyed: We, his Majesty's commissioners of sewers within the county, of, &c. aforesaid, whose names and seals are hereto put and affixed, being willing and desirous to redress so great a grievance, by virtue of the authority to us given, do order, direct, and appoint that G. H., of, &c., and J. K., of, &c., or some or one of them to whom the same appertains, do, on or before, &c., next coming, cause the wall or bank above mentioned to be well and sufficiently repaired, amended, and re-edified, with good and substantial materials, in all parts thereof where it shall appear that the same is in any ways defective, that the lands and low grounds in the said parish of, &c., may be thereby secured from all inundations for the future; and this the said G. H., J. K., &c., are to do at their perils. Given under our hands and seals, &c.

II.

Order to remove Stakes and Piles set up in a River.

It being presented by the jury returned to inquire of default in reparations of sewers, &c., in the county of, &c., at a Court of Sewers held, &c., that T. M. had in the month of, &c., then past, set up and erected several stakes and piles in the river of, &c., in the said county, to the great nuisance and annoyance thereof, which said T. M. is not to be found: We do therefore hereby order and empower L. B., who

is likely to receive the most damage and injury by reason thereof, to remove and abate the said nuisance on or before, &c. next, as to him the said L. B. shall be thought fit. Given, &c.

III.

Assignment of a Surveyor of Sewers.

We, A. B., C. D., E. F., &c., esquires, his Majesty's commissioners of sewers for the county of, &c., do by virtue of the statutes of sewers, and of the power to us thereby given, by this our order under our hands and seals, assign and appoint L. A., of, &c., surveyor of the walls, banks, and sewers, within the level of, &c., in the said county, to oversee, survey, inspect into, and take care of the reparations of the same from time to time, according to the orders and directions of us, or any of us, or any other commissioners of sewers for the said county; and also to present the defects and decays thereof, during our will and pleasure, or for and during the space of, &c. Given, &c.

IV.

An Order on a particular person to pay a Tax.

Whereas on making a rate and assessment upon the owners of lands in the parish and limits of, &c., for the repairing, amending, and maintaining the sea-banks, walls, and sewers therein, for the year, &c., it appeared to us by the information of, &c., on oath, that one A. B. holdeth a certain messuage and twenty acres of land in the said parish and limits, &c., by the tenure and payment of, &c., towards the repairs and maintenance of the said banks and sewers, and the said A. B. having neglected to pay the said sum to our collector appointed to receive the same: We do therefore hereby order the said A. B. within, &c. days next after the date hereof, to pay unto, &c., our collector aforesaid, the aforesaid sum of, &c., to be applied in repairing, amending, and maintaining the walls, banks, and sewers above mentioned; or on the said A. B.'s default therein, we shall decree the said messuage and lands to be sold to satisfy the same; of which the said A. B. is to take notice. Given, &c.

V.

A Warrant to take a Distress for a Tax, and sell Goods.

To T. D., Sewer-Bailiff, or Collector of the Level of, &c.

Whereas complaint hath been made unto us, that C. D. and E. F., of, &c., aforesaid, who are severally rated and assessed in the several sums of, &c., for and towards the necessary reparations and amendments of the banks, walls and sewers within the said level, have refused to pay the same when demanded, contrary to the laws in that case made: These are therefore to authorize and command you to levy the said respective sums of, &c., on the goods and chattels of the said C. D. and E. F. respectively, by distress and sale thereof; And that you do employ the said money, when levied, towards the repairs above mentioned; for which this shall be your warrant. Given, &c.

VI.

A Decree and Sale of Lands by Commissioners, for Payment of Lots and Charges.

This indenture made, &c., between A. B., C. D., E. F., &c., esquires, (six) commissioners of sewers for the county of, &c., of the one part, and G. H., &c., of the other part. Whereas the said commissioners, parties to these presents, having the execution of the laws of sewers, on, &c., last past, made and ordered an equal rate, charge, and assessment, upon all and every the owners and occupiers of lands in the parish and limits of, &c., in the county aforesaid, according to the quantities and qualities of the said lands, for and towards the reparation and amendment of the banks, walls, and sewers within the said limits, pursuant to the laws and statutes in that case made and provided; And whereas in and by the said rate and assessment, L. M., of, &c., aforesaid, was legally charged and assessed in the sum of, &c., as his proportionate lot and charge, towards the said reparations and amendments, for his messuage, tenement, and lands, called, &c., held by lease and grant from, &c., for the term of, &c., who on demand thereof, by, &c., the commissioners' collector lawfully authorized, hath absolutely and contemptuously denied and refused to pay the same; And whereas the said commissioners, or some of them, are credibly informed that the said L. M. hath no goods or chattels whereout the said sum of, &c., may be anyways levied for the purposes aforesaid: Now, to the end of the said sum of, &c., may be paid and applied to the uses above mentioned, in repairing the said sewers, This indenture witnesseth, that the said commissioners parties to these presents, by force and virtue of the statutes of sewers, and the power to them thereby given, and for and in consideration of the covenants and conditions hereinafter on the part and behalf of the said G. H., his executors and administrators, to be performed and done, and also of five shillings of lawful British money to them the said commissioners in hand paid by the said G. H., the receipt whereof is hereby acknowledged, Have ordered, bargained, sold, and assigned, and by these presents do, as much as in them the said commissioners, parties to these presents, lieth, order, decree, bargain, sell, and assign, from the said L. M., his executors, administrators, and assigns, unto the said G. H., his executors and administrators, All and singular the said messuage or tenement, lands and premisses above mentioned, and all ways, waters, easements, profits, privileges, advantages, and appurtenances to the said messuage or tenement and lands belonging or appertaining, To have and to hold the said messuage or tenement, lands and premises to the said G. H., his executors and administrators, for and during all the rest and residue of the said term of, &c., which he the said L. M. had, or ought to have, of or in the same, Upon condition nevertheless, that he the said G. H., his executors and administrators, do and shall yearly and every year, during the said term of, &c., pay or cause to be paid, unto the collector or collectors appointed, all such rates, lots, charges, and assessments, as shall be rated, assessed, or imposed by the commissioners of sewers for the county of, &c., aforesaid, for the time being, on the messuage or tenement and lands above mentioned, upon demanding the same, and on no other condition or trust whatsoever. And the said G. H. for himself, his executors and administrators, doth covenant and grant, to

and with the said commissioners parties to these present, and to and with every of them, their executors, &c., That he the said G. H., his executors and administrators, shall and will from time to time, and at all times during the said term of, &c., aforesaid, well and truly pay or cause to be paid unto the collector or collectors appointed to receive the same, all and all manner of rates, cesses, lots, charges, assessments, and payments, which shall be rated, assessed, charged, or imposed by the commissioners of sewers for the said county of, &c., for the time being, on the messuage, tenement, lands, and premises above mentioned, or any part thereof, towards the reparation of the said sewers, on demand thereof, including the assessment of, &c., aforesaid, without any default, denial, or neglect, by him the said G. H., his executors, &c., according to the true intent and meaning of this present decree and assignment. In witness whereof the said commissioners and parties have hereunto put their hands and seals, the day and year, &c. (a).

VII.

The Certificate thereof into Chancery.

Memorandum this day, &c. The within written decree and assignment of the lands and premises therein mentioned was certified into the High Court of Chancery, by the commissioners within named, under their seals, according to the form and directions of the Acts of Parliament. T. D., Cler. Com.

VIII.

Appointment of a Bailiff of Sewers.

We, A. B., C. D., E. F., &c., esquires, (six) commissioners of sewers within the county of, &c. aforesaid, do hereby depute, assign, and appoint T. D., of, &c., to be our bailiff of sewers for the level or limits of, &c., to execute all warrants, precepts, and summonses to him directed by us, or any of us, or any other his Majesty's commissioners of sewers for the said county, relating to the reparation, amendment, and reformation of the walls, banks, and sewers there; pursuant to the laws and statutes in that case made. Given, &c.

IX.

Appointment of a Collector of Sewers.

We, A. B., C. D., E. F., &c., esquires, commissioners of sewers, &c., do hereby assign and appoint A. T., of, &c., our collector and receiver, during our will and pleasure, to collect and receive all money, by us or by any other of his Majesty's commissioners of sewers for the said county, from time to time ordered and directed to be levied, by rate and assessment, or otherwise, on all owners and occupiers of lands, within the level of, &c., and to pay over the same to B. M., &c., our expeditor appointed; he the said A. T. rendering to us, or some of us, a just, true, and perfect account of all such money by him collected and received within the said level, when thereunto required by us, or any of us, or yearly, &c. Given, &c.

(a) The Metropolitan Sewers Act, 11 & 12 Vict. c. 112, s. 145, excepts the power of decreeing lands from their owners out of the commission. But this is confined to the metropolitan district as defined by that act.

X.

Assignment of an Expenditor.

We, A. B., C. D., E. F., esquires, commissioners, &c., do, by virtue of the authority to us given by the laws of sewers, nominate, assign and appoint B. M., of, &c., gent., expeditor, to pay, disburse, and expend all money raised and levied by our rate and assessment, within the level, of, &c., on all owners and occupiers of lands, &c., chargeable towards the reparations and amendments of sewers, and by him had and received of and from our collector appointed; so as he the said B. M. do and shall from time to time, when thereunto required, yield, render and deliver unto us, a true and perfect account and accounts of all money by him thus paid, for and towards the reparations above mentioned. Given, &c.

XI.

A Warrant or Order for a Collector to Account.

To T. D., Bailiff of Sewers, for the Level, of, &c.

Whereas we have appointed A. T., of, &c., our collector of sewers, within the level of, &c., to collect and receive all money rated and to be levied on the owners of lands, &c., towards the repairs of the banks, walls, and sewers therein, he the said A. T. from time to time accounting with us for the same, when thereunto required: These are therefore to command you forthwith to give notice to the said A. T. personally to be and appear before us, at, &c., on, &c. next, to give and render unto us a true and perfect account in writing of all money by him received, of all and every person and persons, for and towards the reparations aforesaid, and of all other things relating to his office of collector; which he the said A. T. is hereby ordered to do at his peril. Given, &c.

XII.

An Order to provide Carts and Carriages for Repairs of Sewers.

We, A. B., C. D., E. F., &c., esquires, his Majesty's commissioners of sewers within the county of, &c., do hereby order and require T. B., D. W., L. M., &c., who keep horse teams in the parish of, &c. that they and every of them send or cause to be sent out of the said parish, unto, &c., in the aforesaid county, six carts or carriages, on, &c., next ensuing, furnished with a sufficient number of able horses or oxen and workmen, to work on the reparations of the walls, banks and sewers, within the parish and level aforesaid, according to the Acts of Parliament in that case made; being allowed, &c., per day for the same. Given, &c.

XIII.

A Warrant or Order for Labourers to work on the Repairs.

To W. L., N. P., T. A., &c.

These are to command you and every of you, that on notice of this our order, you forthwith go and repair to, &c., in the county of, &c.,

and then and there, as many days, and so long time as shall be adjudged necessary by our surveyor of sewers, do diligently work and labour in the reparations and amendments of the walls, banks, and sewers in the said county; and that you or either of you do not thence depart, without leave of our said surveyor first obtained for the same; all which you are to observe at your peril. Given, &c.

XIV.

An Order to take Timber Trees for Reparation of Sewers.

To T. A., Gent., Surveyor of Sewers in, &c.

Whereas we A. B., C. D., E. F., &c., esquires, commissioners of sewers for the county of, &c., on view do find that the walls, banks, and sewers within the level of, &c., in the county aforesaid, are very ruinous and defective, and require much timber work to put the same in repair. And we being credibly informed that T. D., living within the limits of the said level, hath six large timber-trees standing and growing on his land, called, &c., fit and proper to be cut and employed in the said reparations: These are therefore to authorize and empower you, with workmen, &c., to enter into and upon the land of the said T. D., and cut, take and carry away from the same the said six timber-trees, at seasonable times, without doing any damage to the said land, for and towards the reparations of the walls, banks, and sewers aforesaid, and not otherwise; giving to the said T. D. notice thereof, and tendering and paying to him the sum of, &c., which we adjudge a reasonable price for the same. And this shall be your sufficient warrant in the premises. Given, &c.

XV.

Oath of the Jury summoned to a Court of Sewers.

You shall inquire and make true presentments and judgments of all such things as shall be given you in charge, and which are inquirable and punishable within this level relating to the repairs of the walls, hanks, and sewers. You shall do nothing out of malice or hatred, nor conceal anything through fear, favour, or affection; but in all things shall impartially do your duty herein according to the best of your knowledge. So help you God.

XVI.

Plea by Commissioners of Sewers.

3 Car. & Payne, 63.

And for a further plea in this behalf, as to breaking and entering the said dwelling-house, and as to the seizing and taking the goods and chattels (to wit), one set of cruetts and frame, one hearth-rug, one fender, and one set of fire-irons there found, and carrying away the same, and converting and disposing thereof to his own use, as in the first count of the above declaration is mentioned, he the said defendant, by leave of the Court here for that purpose had and

obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says, that the said supposed trespasses were committed by him, the said defendant, by the authority of a certain commission of sewers for the Tower Hamlets (excluding St. Catherine's and Blackwall Marsh), for a lot or tax assessed upon the said plaintiff by the said commission, according to the purport, tenor and effect of a certain Act of Parliament made in the twenty-third year of the reign of our late sovereign lord King Henry the Eighth; and this he the said defendant is ready to verify; and therefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

XVII.

Oath to be taken by Commissioners of Sewers, under 3 & 4 Will. 4, c. 22, s. 3.

I do swear, [*or, being one of the people called Quakers, do solemnly affirm*], that I truly and *bonâ fide* am in my own right [*or in the right of my wife*] in the actual possession and enjoyment of [*or in the receipt for life, or for a larger estate, of the rents and profits issuing out of*] lands, tenements, or hereditaments, situate in the county of , of freehold or copyhold tenure, *or held for a term of not less than sixty years absolute, or determinable with a life or lives, of the clear yearly value of one hundred pounds above reprises; or held for the unexpired term of* years, originally granted for years, of the clear yearly value of two hundred pounds above reprises; [*or am heir apparent of* , who, to the best of my knowledge, is seised of freehold or copyhold lands, tenements, or hereditaments, situate in the county of , of the clear yearly value of two hundred pounds above reprises]; [*or am agent of* , who, [*or which*], to the best of my knowledge, is seised or possessed in his or their own right [*or in the right of his wife*] of freehold or copyhold lands, tenements, or hereditaments, situate in the county of , of the clear yearly value of three hundred pounds above reprises. So help me God.

[*Or, being a Quaker, omit the words, So help me God.*]

XVIII.

Form of Conveyance of Lands, &c. to Commissioners, under 3 & 4 Will. 4, c. 22, s. 25.

I of , in consideration of the sum of to me paid by six or more of the commissioners of sewers acting in and for several limits [*here describe the limits as set forth in the commission of sewers*], do hereby grant and release to the commissioners of sewers acting in and for the said limits all [*describing the premises to be conveyed*], and all my right, title, and interest in and to the same and every part thereof, to hold to the said commissioners, their successors and assigns for ever, by virtue of the several acts and laws now in force concerning sewers. In witness whereof I have hereto set my hand and seal this day of in the year of our Lord .

XIX.

Form of Conveyance of Lands, &c. from Commissioners, under 3 & 4 Will. 4, c. 22, s. 40.

We, _____, six of the commissioners of sewers acting in and for several limits [*here describe the limits as set forth in the commission of sewers*], in consideration of the sum of _____ to us paid by _____ of _____ do hereby grant and release to the said _____ all [*describing the premises to be conveyed*], and all right, title, and interest of the commissioners of sewers in and to the same and every part thereof, to hold unto the said _____ his heirs, executors, administrators, and assigns for ever. In witness whereof we have hereto set our hands and seals this _____ day of _____ in the year of our Lord _____.

XX.

Form of Mortgage Security, under 3 & 4 Will. 4, c. 22, s. 42.

By virtue of an act passed in the third year of the reign of his Majesty King William the Fourth, intituled [*here insert the title of this act,*] we the undersigned, being six of the commissioners [*here insert the general description of the commission under which they act*], in consideration of the sum of _____ of lawful money of Great Britain to [*here insert the name of the receiver of the district*] lent and paid by _____ do hereby certify, that [*here describe the particular lands, or, if by assessment, the valley, level, or limit in which the lands are situate, which are to be charged*], are become charged with the repayment of the said sum, in instalments of one _____ part on the _____ day of _____ in every year, together with interest on such part of the said principal money as shall remain unpaid from time to time at and after the rate of _____ pounds *per centum per annum*, until the whole thereof shall be repaid; which sum so lent and advanced by the said _____ is part of a capital sum of _____ which, at a Court of Sewers holden at _____ on the _____ day of _____ last, was decreed and ordered to be taken up and borrowed for the purpose of [*here briefly state the general cause or object of borrowing the money*]. In witness whereof we have hereunto set our hands and seals the _____ day of _____.

XXI.

Form of Transfer of Mortgage, under 3 & 4 Will. 4, c. 22, s. 43.

I [*or we*] A. B., of, &c., in consideration of the sum of _____ to me this day paid by [C. D., of, &c.], do hereby transfer the within certificate of charge, with all my right and title to the principal money thereby secured and now remaining due thereon, and to all the interest money now due, or hereafter to become due, unto _____, his [*her, or their*] executors, administrators, successors, and assigns [*as the case may be*]. Given under my hand and seal this _____ day of _____.

Witness,

XXII.

*Form of Warrant for levying Fines, Amerciaments, &c., under
3 & 4 Will. 4, c. 22, s. 54.*

To , our Bailiff of Sewers, and to
and , our Collectors, and to each and every of
them, and to all Constables and Peace Officers.

Whereas at the Court [or session] of Sewers holden for the limits
[here state the name of the commission] on the day of
last, A. B., of , in the county of , carpenter, was fined
[amerced, or otherwise, as the case may be] in the sum of ,
which sum it hath this day been proved to us, the undersigned, being
six or more of the justices and commissioners of sewers for the afore-
said limits, by the oath of duly appointed to receive the same
fine, [amerciament, penalty, or forfeiture, as the case may be], that
the said hath neglected or omitted to pay when demanded of
him: These are therefore to authorize and command you, any or
either of you, to levy the said sum of by distress and sale of
the goods and chattels of the said , together with the costs
and charges of such distress and sale, rendering the overplus, if any,
to the said . Given under our hands and seals the
day of in the year of our Lord one thousand eight hundred
and .

XXIII.

*Form of Mortgage Security for Money borrowed for General
Purposes, under 4 & 5 Vict. c. 45, s. 5.*

By virtue of an act passed in the year of the reign of her
Majesty Queen Victoria, intituled [here insert the title of this act], we,
the undersigned, being six of the commissioners [here insert the general
description of the commission under which they act], in consideration
of the sum of of lawful money of Great Britain to [here insert
the name of the treasurer] lent and paid by do hereby
certify, that the several general sewers rates to be made and levied
within [here insert the name of the district or level] under and by
virtue of the said act are become charged with the repayment of the
said sum, in instalments of one part on the day of
 in every year, together with interest on such part of the
said principal money as shall remain unpaid from time to time, at and
after the rate of pounds *per centum per annum*, until the whole
thereof shall be repaid; which sum so lent and advanced by the said
 is part of a capital sum of which, at a Court of
Sewers holden at on the day of last,
was decreed and ordered to be taken up and borrowed. In witness
whereof we have hereunto set our hands and seals the
day of .

XXIV.

*Form of Transfer of the above Mortgage, under 4 & 5 Vict.
c. 45, s. 6.*

I [or we] A. B., of, &c., in consideration of the sum of to
me this day paid by C. D., of, &c., do hereby transfer the within

certificate of charge, with all my right and title to the principal money thereby secured, and now remaining due thereon, and to all the interest money now due or hereafter to become due, unto [his, her, or their] executors, administrators, successors, and assigns [as the case may be]. Given under my hand and seal this day of

Witness, .

XXV.

Form of Security, 4 & 5 Vict. c. 45, s. 5.

By virtue of an act passed in the year of the reign of her Majesty Queen Victoria, intituled [*here insert the title of this act*], we, the undersigned, being six of the commissioners [*here insert the general description of the commission under which they act*], in consideration of the sum of of lawful money of Great Britain to [*here insert the name of the treasurer*] lent and paid by do hereby certify, that the several general sewers rates to be made and levied within [*here insert the name of the district or level*] under and by virtue of the said act are become charged with the repayment of the said sum, in instalments of one part on the day of in every year, together with interest on such part of the said principal money as shall remain unpaid from time to time, at and after the rate of pounds *per centum per annum*, until the whole thereof shall be repaid; which sum so lent and advanced by the said is part of a capital sum of which, at a court of sewers holden at on the day of last, was decreed and ordered to be taken up and borrowed. In witness whereof we have hereunto set our hands and seals the day of .

XXVI.

Form of Transfer, under 4 & 5 Vict. c. 45, s. 6.

I [or we] A. B., of, &c., in consideration of the sum of to me this day paid by C. D., of, &c., do hereby transfer the within certificate of charge, with all my right and title to the principal money thereby secured, and now remaining due thereon, and to all the interest money now due or hereafter to become due, unto [his, her, or their] executors, administrators, successors, and assigns [as the case may be]. Given under my hand and seal this day of .

Witness, .

XXVII.

Form of Assignment of Provisional Certificate, under 10 & 11 Vict. c. 11.

I, A. B., of in consideration of the sum of pounds paid to me [or of the advances which may be made to me] by C. D., do hereby assign to the said C. D., the within written provisional certificate, and all my right and interest in and to the advances which may be made in virtue thereof, to the intent that the said C. D., his

executors, administrators or assigns, may claim and receive such advances, and may thereout retain the said sum of with interest for the same at per centum per annum [or such sums as may be advanced to me by the said C. D. as aforesaid, with interest at per centum per annum from the time of the respective advances thereof].

In witness whereof I have hereunto set my hand, this day of 18 .

XXVIII.

Form of Mortgage of Rates, under 18 & 19 Vict. c. 120.

Mortgage Number ().

By virtue of an act passed in the year of the reign of Queen Victoria, intituled [*here insert the title of this act*], the Metropolitan Board of Works, or the Board of Works for the district of , or the vestry of the parish of (*as the case may be*), in consideration of the sum of paid to by A. B., of , for the purposes of the said act, do grant and assign unto the said A. B., his executors, administrators and assigns, all [*here describe the monies or rates to be mortgaged*], to hold to the said A. B., his executors, administrators and assigns, from the day of the date hereof until the said sum of , with interest at the rate of per centum per annum for the same, shall be fully paid and satisfied; and it is hereby declared that the said principal sum shall be repaid on the day of , and that in the meantime the interest thereof shall be paid on the day of and the day of in every year.

In witness whereof the Metropolitan Board of Works [*or the said district board, or the said vestry, as the case may be*], have hereunto set their seal this day of , one thousand eight hundred and .

XXIX.

Form of Transfer of Mortgage, under 18 & 19 Vict. c. 120.

I, A. B. of , in consideration of the sum of pounds, paid to me by C. D. of , do hereby transfer to the said C. D., his executors, administrators and assigns, a certain mortgage number , bearing date the day of , and made by the Metropolitan Board of Works, or the Board of Works for the district of , or the vestry of the parish of , for securing the sum of and interest [*or, if such transfer be by indorsement on the mortgage, insert, instead of the words after "assigns," the within security*], and all my property, right and interest in and to the money thereby secured, and in and to the monies thereby assigned.

In witness whereof I have hereunto set my hand and seal this day of , one thousand eight hundred and .

XXX.

Schedule, Form B., under 21 & 22 Vict. c. 98.

By virtue of "The Public Health Act, 1848," the local board of health for the district of , do hereby declare and absolutely
w. x

order that the inheritance of the [dwelling house, shop, lands and premises, *as the case may be*], situate in street, in the parish of , within the said district, and now in the occupation of , shall be absolutely charged with the sum of pounds, paid by of for the improvement by drainage and water supply [*as the case may be*] of the same dwelling house, shop, lands and premises [*as the case may be*], together with interest for the same from the date hereof at pounds per centum per annum, until full payment thereof; and also all costs incurred by the said , his executors, administrators or assigns, under this security, shall be fully paid and satisfied: and we hereby further declare that the said principal and interest monies shall be paid and payable by the owner or occupier of the said premises to the said , his executors, administrators and assigns, in manner following; (that is to say,) the interest on such principal sum of pounds, or on so much thereof as shall from time to time remain due and payable under this order, shall be paid and payable by equal half-yearly payments whilst payable on the day of and the day of in every year, the first payment thereof to be made on the day of next, and such principal sum of pounds shall be paid and payable by equal annual instalments on the day of in each of the next succeeding years, towards the discharge of the same principal sum, until the whole shall be fully satisfied and discharged.

XXXI.

Sewers and Drainage, under 24 & 25 Vict. c. 133.

Schedule, Parts 1 and 2 contain the Rules as to the Election of Members of Drainage Boards and the Rules as to Proceedings of Drainage Boards.

AN INDEX

TO

THE PRINCIPAL MATTERS.

A.

- ACTIONS against commissioners of sewers, 223, 242.
notice of action, 224, 242.
- ADMIRALTY, approval of works under Main Drainage Act, 15.
- ADVANCES OF MONEY, under Drainage Acts, 260, 271.
repayment of, 271.
- ALLOWANCES to commissioners of sewers, 42.
- AMENDMENT of sewers' rate, how made, 175.
- AMERCIAMENTS by a jury of sewers, 204.
- ANNOYANCES under the laws of sewers, 79, 126.
- ANNUITANTS, when liable to the sewers' rate, 110.
- APPEAL from decisions of local board to the general board, 26.
against rates, &c., 181.
- APPORTIONMENT under Drainage Acts, 278.
- ARBITRATION [sewers], 251.
- ASSESSMENT of sewers' rates, how made, and in respect of what,
170.
upon each person, &c., 172.
in respect of the lands, &c., 173.
- AVOWRY, 216.

B.

- BANKS, what within the laws of sewers, 71.
- BARRISTERS, when qualified to be commissioners of sewers, 32, 36.
- BEDFORD LEVEL ACT, rights under, saved, 50, 51.
- BENEFIT, there must be some, to warrant an assessment to sewers,
85.
- BOND from officers of sewers, 152.
- BOUNDARY LINES, 33.
- BRIDGES, what within the laws of sewers, 78.
- BRIGHTON IMPROVEMENT ACT, 29, 53.

BURIAL BOARD, City commissioners the board in the city, 12.

BYE-LAWS may be made by the Metropolitan Board, 17.

C.

CALCIES, what within the laws of sewers, 77.

CAMBRIDGE commissioners of sewers, their jurisdiction saved, 25.

CAUSEWAYS or calcies, 77.

CERTIORARI [sewers], 48.

when granted to remove orders of sewers, 229.

on the removal of the clerk, 233.

what follows upon issuing the writ, 235.

disobedience to the writ, how punished, 237.

what done upon the return, 239.

procedendo, *ib.*

costs, *ib.*

CHAIRMAN of Court of Sewers, 147.

CLERK of sewers, not to be treasurer, 157.

commissioners may sue in his name, 223.

may be a witness, 224.

Local Board of Health may sue in his name, 227.

cannot be removed without *certiorari*, 233.

COMMISSION OF SEWERS, the first, 6.

23 Hen. 8, c. 5 . . 8.

may be issued under the Drainage Act of 1861 . . 26.

continues under 24 & 25 Vict. c. 133, until superseded by the Crown, 46.

COMMISSIONERS must not meddle with other drainages, 70.

CONSERVATORS, Thames, rights of, saved, 15.

CONSTABLES to obey commissioners of sewers, 155.

COPYHOLDERS, when liable to the sewers' rate, 107.

CORNWALL, Duchy of, rights of, saved, 17.

CORPORATION, when privileged from the operation of the Public Health Act, 21.

when liable to repair sewers, 89, 94.

COSTS may be decreed by commissioners of sewers, 200.

on writ of *certiorari* to remove orders of sewers, 239.

COVENANT to repair sewers, 90.

CUSTOM as to the repair of sewers, 89.

repair by, may be commuted, 90.

D.

DECREE of lands from their owners, 217.

what lands may be sold, 220.

who bound by such decrees, 221.

to whom lands may be decreed, 222.

"DEODORIZE" defined, 15.

- DISTRESS** for arrearages of sewers, 56, 107, 209.
commissioners could not levy a fine by, till 3 & 4 Will. 4, c. 22, s. 53. . . 208.
distress concerning sewers, 209.
warrant, 210.
where, and on whose goods, 210, 211.
sale of, 212.
replevin, 214.
- DISTRICT BOARD**, sewers vested in, 13.
works beyond their district must be approved by Metropolitan Board, 16.
- DITCHES**, what within the laws of sewers, 70.
- DOCK COMPANY**, when bound to repair a channel, 71.
- DRAINAGE**, under the Public Health Act, 133, 175.
commissioners of sewers sometimes elected under, 51.
- DRAINAGE ACT OF 1861**, commissioners of sewers may be sued under, 26.
- DRAINAGE ACTS**,
the acts on that subject, 254.
advances of money, 260—271.
apportionment, 278.
- DRAINAGE ELECTORAL BOARDS**, 288.

E.

- EAU BRINK DRAINAGE**, rights under, saved, 52.
not a public drain, 71.
- ECCLESIASTICAL PERSONS**, when liable to the sewers' rate, 107.
- ELECTORAL DRAINAGE BOARDS**, under 24 & 25 Vict. c. 133. . . 288.
- ENTRY** upon lands, under the Public Health Act, 26.
- ESTATE**, qualification by, 30.
- EXECUTOR**, when liable for the covenant of his testator in cases of sewers, 92.
- EXTINGUISHMENT** by act of parliament, 53.

F.

- FERRY**, owner of, when liable to the sewers' rate, 108.
- FINES**, saving of, to the Crown, and estreating, 11.
by commissioners, 202, 203.
must be reasonable, 203.
whether traversable, *ib.*
by 3 & 4 Will. 4, c. 22, s. 53, are to be received by commissioners of sewers, and not returned into the Exchequer, 208.
- FRONTAGE**, liability to repair, 87.

G.

- GAS, when a nuisance to waterworks, 142.
GENERAL BOARD OF HEALTH, 18.
 how they are to proceed in order to form districts, 19.
 their provisional order, 20.
GENERAL SEWERS' TAX, 96.
GOODS, when liable to the sewers' rate, 114.
GOTES, what within the laws of sewers, 77, 80.
 what, annoyances within the same, 80.
GRANT, obligation to repair sewers by reason of, 92.
GUTTERS,
 what within the law of sewers, 72.
 difference between gutter and sewer, *ib.*

I.

- IMPRISONMENT, by order of commissioners of sewers, 205.
INCLOSURE COMMISSIONERS,
 their recommendation necessary for new commissions of sewers,
 27.
 commutation of liabilities by their sanction, 90.
INDICTMENTS, by commissioners of sewers, 223.
INJUNCTION,
 when refused against commissioners of sewers, 250.
 when granted, 251.
INSPECTOR OF NUISANCES, under Local Board of Health,
 157.

J.

- JURY,
 of sewers, 161.
 whence summoned, 163.
 may be compensated, 168.
 may be dispensed with, *ib.*
 in cases of purchase of land by commissioners of sewers, 190.

K.

- KENSINGTON PALACE, not liable to sewers' rate, 107.

L.

- LANCASTER, duchy of,
 commissioners of sewers, 10.
 rights of, saved, 17.

- LAW OF SEWERS, liability to repair under, 93. .
LEA RIVER, works not to be erected on, unless under conditions,
15.
LESSEES for years, when qualified to be commissioners of sewers, 32.
LEVEL, when liable to repair sewers, 98, 105.
LOCAL ACTS saved, 50.
LOCAL BOARD OF HEALTH,
 how composed, 18.
 sewers placed under their control, 25.
 their jurisdiction, 22, 157.
LOCAL MANAGEMENT ACT,
 as to sewers, 12, 13.
 under 21 & 22 Vict. c. 104. . 13.
LONDON, City, Sewers' Act, 29.
LONDON COMMISSIONERS, rights of, saved, 50, 51.
LORD OF MANOR, when liable to the sewers' rate, 107.

M.

- MAGNA CHARTA, provisions of, concerning bridges and banks, 5.
MAIN DRAINAGE, 13, 14.
 25 & 26 Vict. c. 102. . 15.
 a private person must not touch it without notice to the Board,
 16.
MANDAMUS, when granted against commissioners of sewers, 222,
241.
MANORS, Lords of, 107.
MAP of sewerage district, 140.
MAYOR, &c., needs not take an oath of qualification, 41.
MEETINGS of Court of Sewers, 141.
 special, 148.
METROPOLIS IMPROVEMENT ACTS, rights saved, 50.
METROPOLIS SEWERS, now vested in vestry or district boards,
 except main sewers, 12.
METROPOLIS SEWERS' COMMISSION, now abrogated, 11.
 what were disqualifications as to commissioners, 33, &c.
METROPOLITAN BOARD OF WORKS,
 may declare what sewers shall be main sewers, 13.
 their powers, *ib.*
 under the Main Drainage Act, *ib.*
 how restricted, 15.
MILL DAMS, powers to meddle with, under 24 & 25 Vict. c. 133. .
60.
MILL PONDS, what annoyances within the Statute of Sewers, 80.
MORTGAGES, by commissioners of sewers, 184, 187.
MORTGAGOR, when liable to the sewers' rate, 109.

*

N.

- NEW SEWERS, 16, 74.
 under 24 & 25 Vict. c. 133 . . 59.
- NEW WORKS,
 under 3 & 4 Will. 4, c. 22 . . 117, 122.
 under 24 & 25 Vict. c. 133 . . 124.
- NOTICE of action, to the clerk of sewers, 224, 242.
- NUISANCES REMOVAL ACT, rights under, saved, 50.
- NUISANCES, private, 131.

O.

- OATH, what to be taken by commissioners of sewers, 39.
- OCCUPIER,
 to take away gravel, &c., and weeds from his banks, 83.
 he is to drain and cleanse, *ib.*
- OFFICE, qualification by, 35.
 what offices do not give competency, 36.
- OFFICERS of sewers, appointment of, 56, 148.
 punishable for misbehaviour, 149.
 removal of, 150.
 remuneration of, 151.
 must account, 152.
 under Public Health Act, 154, 157.
- OFFICES, when liable to the sewers' rate, 110.
- ORDER IN COUNCIL, under the Public Health Act, 20.
- ORDERS of Commissioners indefeasible till set aside by subsequent Courts, 46.
- OWNERS of lands, who under Drainage Acts, 238.
 may construct drainage works at their own expense, 16.
 but with notice, *ib.*
 but must not meddle with the main sewer without leave from the Board, *ib.*
- OWNERSHIP of banks, walls, &c., 71.
- OXFORD commissioners of sewers, their jurisdiction saved, 25.

P.

- PARISH, when liable to the repairs of sewers, 94.
- PENALTIES concerning sewers, 11, 158.
- PERJURY, punishable under Public Health Act, 228.
- POLICE ACT, rights under, saved, 50.
- PONDS, when annoyances within the Statute of Sewers, 80.
- POOLS, when within the Statute of Sewers, 81.
- PRÆMUNIRE, an old way of proceeding against commissioners of sewers, 240.

- PRESCRIPTION**, when it induces a liability to repair sewers, 89.
may be commuted, 90.
- PRESENTMENT** of jury, need not be made upon every occasion of
repair, 167.
of surveyors of sewers, when traversable, 169.
- PROPRIETORS** under the Drainage Act of 1861. . 28.
- PROVISIONAL CERTIFICATE**, under Drainage Act, 262.
- PROVISIONAL ORDER**, under Public Health Act, 20.
- PUBLIC HEALTH ACT**, 18.
rights under, saved, 50, 52, 90.
does not affect commissioners of sewers, 76.
as to drainage, &c., 135.
as to officers, 156.
as to mortgages, 184.
as to purchases of land, 189.
as to punishments, 226.
- PURCHASE** of lands by commissioners of sewers, 189, 193.
under Bedford Level Act, 194.

Q.

- QUAKER** relieved from oath of qualification, 39, 40.
- QUALIFICATION** of members of Local Board of Health, 24, 32.
of commissioners of sewers, 30.

R.

- RATE** for drainage, 175.
general district, 176.
for private improvements, *ib.*
for water, 177.
may be remitted in cases of poverty, 180.
amendment of, 175.
appeal against, 181.
- REGISTRAR-GENERAL**, return of, as to deaths, how it operates to
give jurisdiction to the General Board of Health, 19.
- RENT-CHARGE**, in lieu of tithes, when liable to the sewers' rate,
111.
- REPAIRS** of sewers, 71, 82, 94, 98, 170. See *Sewers*.
- REPLEVIN**, 214.
avowry, 216.
- REVERSIONER**, when liable to the sewers' rate, 108.
- RIVERS** within the laws of sewers, 67.
not so, if not navigable, 69.
- ROMNEY MARSH**, saved out of 3 & 4 Will. 4, c. 23. . 50.
and 10 & 11 Vict. c. 38. . 51.
law of sewers, when to be followed, 62.

S.

SAVING CLAUSES, 50, 51.

SEWER, derivation of this word, 1.

distinction between a sewer and a gutter, 2, 72.

SEWERS, commission of, its origin, 1, 2.

commissions by statute, 4.

settled estates, Court of Chancery ; sewers, 293.

the statute of sewers, 23 Hen. 8, c. 5. . 8.

counties palatine, 10.

saving of fines, 11.

expenses of commissioners, *ib.*

Metropolis Sewers' Act, *ib.*

when vested in local board, 18.

qualification of commissioners, 30.

exceptions, 36.

oath, 39.

allowances, 42.

continuance of commissions and laws of sewers, 43.

under 24 & 25 Vict. c. 133, until superseded by the Crown, 46.

supersedeas, 47.

certiorari, 48.

commissioners by Act of Parliament, 49.

elected sometimes under Drainage Acts, 51.

the commission, 55, 61.

power of commissioners under 24 & 25 Vict. c. 133, s. 16 . . 59.

laws of Romney Marsh, 62.

survey, 64.

walls, 65.

streams and watercourses, 67.

rivers, *ib.*

ditches, banks, gutters and sewers, 70, 71, 72

new sewers, 74.

gotes and calcies, 77.

bridges, 78.

trenches, 79.

annoyances, as springs, 79.

mills and mill dams, 80.

wears, gotes, &c., *ib.*

ponds, *ib.*

pools, 81.

inquiry into defaults, *ib.*

who to repair, 82.

the person must receive a benefit, 85.

frontage, 87.

use, *ib.*

tenure, 88.

prescription and custom, 89.

liability to repair by prescription, &c., to continue notwithstanding Public Health Act, 90.

covenant, *ib.*

grant, 92.

laws of sewers, 93.

SEWERS—(*continued*).

- corporation, 94.
- parish, townships, &c., 95.
- repairs, when made by the level, 98, 105.
- new walls, &c., 105.
- ecclesiastical persons, 107.
- lords of manors, *ib.*
- copyholders, *ib.*
- ferry owners, 108.
- exemption by custom, *ib.*
- reversioners, *ib.*
- mortgagors, 109.
- owners of officers, 110.
- annuitants, *ib.*
- what lands chargeable, *ib.*
- tithes, 111.
- goods, 112.
- perpetual charges, 113.
- new walls, &c., 117.
- new works, under 3 & 4 Will. 4, c. 22. . 122.
- under the Public Health Act, 124.
- * destruction of annoyances, 126.
- of private nuisances, 131.
- sewers under the Public Health Act, 132.
- map, 141.
- public walks, *ib.*
- commissioners of, have a Court of Record, 145.
- what constitutes a Court, 147.
- chairman of Court, *ib.*
- meetings, *ib.*
- special meetings, 148.
- appointment of officers, *ib.*
- officers punishable for misbehaviour, 149.
- removal of officers, 150.
- bond, 152.
- security under Public Health Act, 154.
- commissioners to make laws and decrees, 160.
- to summon a jury, 161. See *Jury*.
- surveyor's presentment, 168.
- when traversable, 169.
- repairs, 93, 170.
- assessment, how made, *ib.*
- amendment of rate, 175.
- rate under 11 & 12 Vict. c. 63, *ib.*
- appeal, 181.
- borrowing, 184.
- mortgage, *ib.*
- purchase of lands, 189, 193.
- costs, 200.
- punishments, 202.
- finer, *ib.*
- amerciaments, 203.
- imprisonment, 205.
- distress, 209.

SEWERS—(*continued*).

- how taken, 211, 212.
- sale, 212.
- replevin, 214.
- avowry, 216.
- decrees of lands, 217.
- what lands to be sold, 220.
- to whom they should be decreed, 222.
- writ of mandamus, *ib.*
- indictments, 223.
- actions, *ib.*
- proceedings under 11 & 12 Vict. c. 63. . 226.
- of the *certiorari*, 229.
- disobedience to that writ, 237.
- procedendo*, 239.
- costs, *ib.*
- præmunire*, 240.
- Smithfield Improvement Act, right under, saved, 50.
- actions, 242.
- notice of action, 248.
- injunction, 250.
- arbitration, 251.
- trial, 252.

SOMERSET HOUSE, apartments in, liable to sewers' rate, 107.

SPRINGS, what annoyances within the Statute of Sewers, 79.

STREAMS, within the laws of sewers, 67.

SUPERINTENDING INSPECTOR, his powers, 26.

SUPERSEDEAS of commissions of sewers, 46, 47.

SURVEY by commissioners of sewers, 57, 64.

SURVEYOR of sewers, presentment of, 168.

when traversable, 169.

T.

TAX, general sewers', 96.

TENDER of amends, 240.

TENURE, in the law of sewers, when it induces a liability to repair, 88.

repair by, may be commuted, 90.

THAMES EMBANKMENT ACT, rights under, saved, 50, 52.

TITHES, when liable to the sewers' rate, 111.

rent-charge in lieu of, *ib.*

TOWNSHIPS, when liable to repair sewers, 94.

TOWNS' IMPROVEMENT CLAUSES ACT, 291.

TREASURER of sewers must not be clerk, 157.

TRENCHES, what within the Statute of Sewers, 79.

TRESPASS, when maintainable by commissioners of sewers, 225.

TRIAL, 242.

U.

UNDER-LESSEE, when liable to drainage works, 17.

USUS REI, 87.

V.

VESTRY BOARD, sewers vested in, 13.

when they execute works beyond the sewerage district, must have leave of the Metropolitan Board, 16.

W.

WALLS, what within the laws of Sewers, 65, 66, 104.

WATER, supply of, under Public Health Act, 141.

WATERCOURSE, what within the laws of Sewers, 67.

WATER RATE, under the Public Health Act, 177.

WATERWORKS COMPANIES, their consents when required, under the Public Health Act, 21.

WEARS, all to be put down, 5.

what annoyances within the Statute of Sewers, 83.

WEEDS to be taken away by occupiers of banks, *ib.*

WESTMINSTER COMMISSIONERS, rights of, saved, 51.

WITNESS, no person incompetent by reason of his being rated, 225.

LONDON:
PRINTED BY C. ROWORTH AND SONS,
BELL YARD, TEMPLE BAR.

